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No._____

In the Supreme Court of the United States

LINCOLN LOAN COMPANY,
an Oregon corporation,
Petitioner,
v.
THE CITY OF PORTLAND, GRETCHEN KAFOURY, DAVID SWEET, and MITCHELL McKEE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED FOR REVIEW

A duly constituted and properly instructed jury heard substantial evidence that the City and its officials maliciously singled out Lincoln Loan for mistreatment and attempted to destroy its legitimate business. By its verdict, the jury found that the City had violated Petitioner's Fourteenth Amendment rights to equal protection of the laws and substantive due process. The state appellate courts' reversal of Petitioner's judgment implicates several strands of Fourteenth Amendment jurisprudence never before presented and decided in a single case, including the following:

(A) Given the ancient common law heritage of the right to livelihood, what is the proper standard of scrutiny for claimed substantive due process and equal protection violations of the right? Do the identical rules and standards govern commercial livelihood of corporations?

(B) What deference, if any, must be paid to the jury's determination that constitutional violations occurred after that jury heard and assessed all of the evidence of malicious government conduct as well as opposing evidence of purported government justification?

(C) Whatever standards of scrutiny and review apply, does the presence of admitted ill will and

malicious motivation on the part of the government mean that the governmental conduct is irrational *per se* for purposes of constitutional analysis even if some -- but not all -- of the conduct could be permissible absent malice?

(D) Whatever standards apply, does the Constitution require a total destruction of a corporation's business before an improper governmental invasion of the company's right to livelihood constitutes a cognizable civil rights violation?

(E) Does it make any difference in assessing violations of the Fourteenth Amendment and in answering the foregoing inquiries that the constitutional challenge is to executive or administrative conduct rather than to duly enacted legislation?

CORPORATE DISCLOSURE STATEMENT

Lincoln Loan Company is wholly owned by Steven E. Benson and Melinda Benson Wilde. No parent or publicly held company owns 10% or more of the corporation's stock.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

Petitioner Lincoln Loan Company, an Oregon corporation ("Lincoln Loan" or "Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, denying review and reconsideration of the decision of the Court of Appeals of the State of Oregon, in order that

Lincoln Loan may obtain relief from Respondent The City of Portland ("City") and individual Respondents, Gretchen Kafoury, David Sweet, and Mitchell McKee (collectively "City Officials").[1] Specifically, the Petition seeks reinstatement of the jury verdict and trial court judgment against the City for violation of Petitioner's constitutional rights to equal protection of the laws and substantive due process.

CITATIONS TO REPORTS BELOW

Following a trial to the Circuit Court of the State of Oregon for the County of Multnomah ("Circuit Court") on Lincoln Loan's claims under 42 U.S.C. § 1983, and for common law violations, the jury rendered its verdict in favor of Lincoln Loan and against the City for violation of Lincoln Loan's constitutional rights to equal protection of the laws and substantive due process (A-67)[2] and for

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[1] The Circuit Court granted a directed verdict in favor of Respondents Gretchen Kafoury, David Sweet, and Mitchell McKee on the basis of qualified immunity (Tr. 2831-33). Lincoln Loan cross-appealed from this portion of the Judgment (Appendix A), and the Oregon Court of Appeals affirmed on cross-appeal. *Lincoln Loan Co. v. City of Portland*, 158 Or. App. 574, 576, 588, 976 P.2d 60, 61, 68 (1999), *rev. denied*, 330 Or. 138, 6 P. 3d 1098 (2000).

[2] "A" refers to the Abstract of Record provided by the City to the Court of Appeals for the State of Oregon. "Tr." and "Tr. (Gianni)" signify the transcript of the jury trial, and "Ex." refers to exhibits admitted at trial by the

intentional interference with Lincoln Loan's contractual relations with its business customers (A-67).[3] Based on this verdict, the Circuit Court entered judgment on September 6, 1995, in Petitioner's favor in the amount of $2,753,327.56, together with prejudgment interest from August 16, 1995, for post-judgment interest, and for Petitioner's reasonable attorney fees (A-81). A copy of that judgment, which is not reported officially or unofficially, is appended as Appendix A.

The City appealed the equal protection and substantive due process segment of the judgment to the Court of Appeals of the State of Oregon ("Court of Appeals"); it did not appeal the portion of the judgment relating to intentional interference. The Court of Appeals reversed the trial court judgment on February 24, 1999; that decision is reported in *Lincoln Loan Co. v. City of Portland, supra,* 158 Or. App. at 574, 976 P.2d at 60, a copy of which is appended as Appendix B. The Court of Appeals decided that Lincoln Loan did not prove a

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Circuit Court.

[3] The jury awarded $2,750,000.00 for the civil rights violations, and $3,327.56 for the intentional interference with contractual relations (A-67 - A-69). The record contains substantial evidence of significant harm flowing from the constitutional violations, including loss of existing business and loss of potential future business (e.g. Tr. 143-44, 711-13, 722-23, 1616, Ex. 285.)

substantive due process violation because the City did not completely destroy its business, *id.*, 158 Or. App. at 583-84, 976 P.2d at 65-66, and it overturned Petitioner's equal protection verdict on the theory that Lincoln Loan failed to show that it was treated differently from other similarly-situated persons, *id.*,158 Or. App. at 585-86, 976 P.2d at 66-67.

The Court of Appeals denied Lincoln Loan's Petition for Reconsideration and Request for Reargument on July 14, 1999; a copy of that Order, which is not reported officially or unofficially, is appended as Appendix C.

The Oregon Supreme Court denied review by Order dated March 21, 2000; that Order is reported in 330 Or. 138, 6 P.3d 1098 (2000), and a copy is appended as Appendix D. The Oregon Supreme Court denied reconsideration by Order dated July 5, 2000; a copy of that Order, which is not reported officially or unofficially, is appended as Appendix E.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Oregon Court of Appeals reversed the judgment of the Circuit Court on February 24, 1999, and denied reconsideration on July 14, 1999. The Oregon Supreme Court denied review on March 21, 2000, and denied reconsideration on July 5, 2000. This Petition for Writ of Certiorari is timely because it is filed within 90 days of the Oregon Supreme Court's Order denying

Petitioner's motion for reconsideration. 28 U.S.C. § 2101(c). This Court has jurisdiction to review the judgment of the Oregon Supreme Court on Writ of Certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition implicates Amendment XIV, Section 1, of the Constitution of the United States of America:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It also implicates 42 U.S.C § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

> any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FEDERAL QUESTION PRESERVED BELOW

In Oregon state court, this case proceeded to trial upon Petitioner's Fourth Amended Complaint ("Complaint") and Respondents' Answer to Fourth Amended Complaint With Defenses ("Answer"). Petitioner pled a violation of 42 U.S.C. § 1983 as its Fourth Cause of Action (A-16 - A-27); within that cause of action, Petitioner pled a violation of its right to substantive due process as Count One (A-17 - A-19) and a violation of its right to equal protection of the laws as Counts Two and Six (A-19 - A-20, A-25 - A-26). Conforming to Oregon pleading practice, Lincoln Loan pled the ultimate constitutive facts comprising these Federal claims. *Id.* By

their thirteenth and fourteenth affirmative defenses, Respondents' Answer pled that Petitioner failed to state a claim for relief by these Amendment XIV claims (A-43 - A-44). Relevant portions of the Complaint (Appendix F) and Answer (Appendix G) are appended to this Petition.

The Circuit Court deferred ruling on Respondents' Motion for Judgment on the Pleadings until all evidence had been adduced (A-47). At the close of evidence, the Respondents moved for a directed verdict on the constitutional claims (A-47 - A-59); as to Lincoln Loan's claims for violation of its rights to substantive due process and equal protection of the laws, the trial court denied the City's motions (A-61 - A-63) (Tr. 2831-33). Relevant portions of the motions, arguments, and trial court ruling are appended as Appendix H.

As revealed by Appendix B, on the City's appeal of the judgment rendered against it for violations of the constitutional rights to substantive due process and equal protection of the laws, the Oregon Court of Appeals reversed that judgment and held that Lincoln Loan had not proved a cognizable constitutional violation. The issues before this Court also were briefed to the Oregon Court of Appeals on Petition for Reconsideration and Request for Reargument, and to the Oregon Supreme Court on Petition for Review and Petition for Reconsideration; the sole written Orders arising from these proceedings are appended as Appendices C, D, and E.

STATEMENT OF THE CASE

One decisive fact differentiates this case from virtually all others: the City acknowledged that this record contains evidence sufficient to support a jury finding that City officials acted with malice toward Lincoln Loan. At trial, the City's lawyer conceded that this record contains evidence of "bad motivation" on the part of the City and its officials (Tr. 2780, Appendix I). On appeal, the City's chief legal officer conceded that "The City . . . didn't like Lincoln Loan because of its business practices and philosophy . . ." (Court of Appeals Tr. 14) (Appendix J).[4] Given its verdict, the jury necessarily found that the City's conduct was malicious (Appendix A). While in other reported cases the government invariably disputes the improper motives and impropriety of the conduct of its agents, in this case that issue cannot be contested.

The City and three City officials engaged in a concerted, malicious abuse of governmental power designed to drive Lincoln Loan, and only Lincoln Loan, out of business. They undertook a campaign of harassment and persecution because they disliked Petitioner's useful enterprise and disdained the

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[4] The Oregon Court of Appeals assumed that Petitioner introduced substantial evidence from which the jury could conclude that the City acted with malice. *Lincoln Loan Co. v. City of Portland, supra,* 158 Or. App. at 582, 976 P.2d at 64-65.

economically-disadvantaged families who benefitted from Lincoln Loan's legitimate activity. Based upon a fully developed factual record, a properly instructed jury returned a verdict holding the City responsible for its malevolent conduct. Because the City's malice-driven misdeeds merely damaged, but did not destroy, Lincoln Loan's business, the Oregon appellate courts overturned Petitioner's verdict and, in so doing, mangled the concepts of equal protection of the laws and substantive due process guaranteed to all citizens by the Fourteenth Amendment.

Lincoln Loan sells homes, ordinarily "fixer-uppers" in "as is" condition, on land sale contracts (Tr. 576). These contracts are common, legal, and enforceable (Tr. 521-22, 949-50, 954-66, 2502). Many Lincoln Loan contract purchasers are low to medium income buyers who cannot make the large down payment required by mainstream institutional lenders, but who are willing and able to apply their own labor to repair and upgrade their homes (Tr. 589, 625). Thus, the reduced price and the absence of a large down payment enable an economically disadvantaged class of individuals and families to buy homes that they otherwise could not afford (Tr. 625). Lincoln Loan deals closely and personally with each purchaser in relationships based on trust (Tr. 725-26), and many of its buyers significantly improve the quality of their homes. (*E.g.* Tr. 93, 116-17, 165, 193-94, 224-25, 258.)

Lincoln Loan also makes some purchase money or

construction mortgage loans to individuals who may or may not occupy a low income bracket (Tr. 576-78, 661-62), and it maintains some rental properties. Before and during autumn 1993, the second generation family owners of Lincoln Loan substantially upgraded its rentals so that most looked "pretty good" to the City inspector in early 1994 (Tr. 609). Indeed, some of these rentals were newly constructed (Tr. 928; Exs. 712A, 712C). The City admitted that Lincoln Loan owns approximately 37 vacant lots and 30 rental units, holds mortgages on some 53 properties, and is selling approximately 120 properties on land sale contracts (A-3; admitted A-34).

The City has assailed Lincoln Loan for decades (See Ex. 254). It dislikes Lincoln Loan and the Benson family that founded and operate it because it disagrees with their business philosophy (Court of Appeals Tr. 14). Essentially, the City elitists believe that Lincoln Loan customers "shouldn't have" their own homes and do not "deserve" to be homeowners (Tr. 144-45).

In late 1993, the City created its "Dirty Dozen" program that sought to target - exclusively - rental properties owned by those the City enforcement officials considered the "worst" landlords (Tr. 1259, 1265-66, 1297, 1866-67, 1870, 2118, 2133). Pursuant to this program, the City decided to inspect all rental properties of all targeted landlords "proactively" (that is, without prior complaint), and to charge any person owning an undefined interest in any such rental real property a monthly penalty for

any rental housing violation not repaired within 30 days of citation (1246-48). An ordinance turned this monthly penalty into a senior lien upon the affected property (*Id.*). Additional penalties could be added to charges unpaid for more than 30 days (*Id.*).

Although the City knew that Lincoln Loan sold many properties on contract and held mortgages on numerous other real properties (Tr. 1190-91, 1197, 1677, 1769), it included Lincoln Loan as a "Dirty Dozen" landlord (Tr. 1694) without attempting to distinguish between Lincoln Loan's rental properties and those in which it was a mortgagee or a contract vendor (Tr. 1970). Lincoln Loan complained to the City concerning the impropriety of inspecting non-rental properties under the rental inspection program, and offered to provide a complete list of all of its real estate holdings by category, thereby enabling the City to inspect only rental properties and avoid disturbing the mortgagors and contract vendees (Tr. 606). The City declined the offer, responding that it "didn't care" about the distinction, and that all properties (including vacant lots) in which Lincoln Loan held any interest would be inspected (Tr. 601). Respondent Mr. Sweet acknowledged that Lincoln Loan was a "special case" (Tr. 1467) and Respondent Mr. McKee conceded "there was something else behind the scenes that was going on." (Tr. 640). The City disregarded the axiom that a mortgagee has no right to enter onto mortgaged real estate and commence altering

the mortgagor's home when the latter has not breached the terms of the mortgage. It ignored the like principle that a contract seller of land may not renovate the home of a contract purchaser who is not in default. Respondent Mr. McKee admitted that the appropriate response to a violation notice erroneously directed to a contract seller would be to forward it to the purchaser (Tr. 1939-40). Nonetheless, Mr. McKee proceeded to inspect the homes of Lincoln Loan's contract purchasers for fifteen months, knowing full well that his conduct would cause economic hardship for some of these purchasers (Tr. 1631-32; Ex. 143, p. 2). As Lincoln Loan proved at trial, these City actions dissuaded existing and potential customers from doing business with Petitioner. (*E.g.* Tr. 143-44, 711-13, Ex. 285, Tr. 722-23, 1616.)

At the same time that the City mounted its campaign against Lincoln Loan and its customers, the City granted special favors to lenders and sellers competing with Lincoln Loan in the marketplace, and did not require these favored persons to comply with the same "rules" applied to Petitioner (*e.g.*, Tr. 496, 514). For example, at the time the City was targeting Lincoln Loan for "Dirty Dozen" enforcement, code-deficient homes owned by other entities were receiving fee waivers and other special privileges from the City (*see, e.g.*, Tr. 1198, 1221, 1229-30). In fact, the City cancelled code enforcement fees in some situations, and in other instances did not impose them at all (Tr. 1148, 1218; Ex.

89). In contrast, the City never bothered to advise Lincoln Loan's purchasers about the availability of fee waivers or other special benefits for which they apparently qualified (Tr. 1215, 1873).[5] In fact, at the time this action was filed, no property in which Petitioner held an interest had ever received a fee waiver (Tr. 1163-65). At trial, the jury considered evidence that several financial institutions owned interests in multiple houses afflicted with City code violations, yet the City did not target these companies, did not include them in its "Dirty Dozen" enforcement program, and did not accuse them of unethical practices, criminal racketeering, or other serious wrongs (Ex. 230).

Thus, the City singled out Lincoln Loan for differential treatment for one reason, and one reason only: the City disliked Lincoln Loan because of the way

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[5] The City's "new owner" letters demonstrate a particularly disparate treatment of Lincoln Loan and its customers. As a matter of course, the City sends "new owner" letters to contract purchasers of homes with code violations (Ex. 193). These letters inform the recipient that, as a contract purchaser, he or she is "solely responsible" for all repairs and maintenance (Tr. 1656). Respondent Mr. McKee knew that he was inspecting properties belonging to Lincoln Loan contract purchasers, but he did not send any of them the standard "new owner" letter (Tr. 1657, 1679). He was "not sure" why he failed to do so (Tr. 1657).

it conducted its lawful business. No other mortgage lenders were selected for investigation despite the fact that these favored lenders owned properties with like code violations (Tr. 1182, 1313). No other contract sellers were selected intentionally for inclusion in the "Dirty Dozen" or for proactive investigation (Tr. 1182, 1313).[6] No similar lender or vendor has ever been subjected to a specially organized meeting, the intent of which was to incite customers to discontinue doing business with it and to sue it (Tr. 409, 1243, 1856). As the jury heard, the City considered Lincoln Loan a "special case" (Tr. 1467) in a pejorative sense, and the City treated it as such.

In addition to singling out Lincoln Loan wrongfully, the City's challenged actions contrast with the facts in almost all reported cases in two other respects. First, the City's malicious conduct was administrative, not legislative; the "Dirty Dozen" program was never authorized, ratified, or enacted into law. Second, unlike

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[6] Although the Court of Appeals noted that "there was evidence that City had cited violations under the ["Dirty Dozen"] program at several properties being sold on contract by another owner," *Lincoln Loan Co. v. City of Portland*, 158 Or. App. at , n.16, 976 P.2d at , n.16, the evidence at trial was clear that such inspections were unintentional. The inspector admitted that, at the time he made the inspections, he was under the mistaken belief that those properties he inspected were rental properties. Tr. 1179-81.

traditional administrative enforcement, the Dirty Dozen scheme focused not on specific problems (*e.g.*, fire hazards) nor on a particular geographic area (*e.g.*, blighted neighborhoods), but rather on particular persons perceived by the administrative officers as "problems."

The City did not stop with singling out Lincoln Loan for ad hoc administrative scrutiny. Those decisions comprised just the beginning of a calculated government program designed to harm Lincoln Loan or drive it out of business. The record contains, and the jury necessarily found, substantial evidence of overt ill-will on the part of the City, leading to the latter's concession in court that this record contains proof of actual malice sufficient to support jury verdict (Tr. 2780, Appendix I). For example, City officials advised Lincoln Loan customers that the company was stealing from them and defrauding them (Tr. 364). The City repeatedly made false accusations about Lincoln Loan, claiming that it committed fraud, forgery, unethical practices, racketeering, and myriad other improprieties (Tr. 142-43, 162-63, 197, 362-63, 365, 367, 468). At trial and under oath, however, Respondents Messrs. Sweet and McKee explicitly admitted they had no reason to believe that Lincoln Loan had committed any fraud, any crime, or any unethical business practice (Tr. 1333-34, 1706-07). In one instance, Respondent Mr. McKee told Lincoln Loan customer Creta Jones that Petitioner dishonestly was selling properties it did not own and that she ought to hire a lawyer (Tr. 197, 1622).

The City also disseminated false and disparaging information about Lincoln Loan to the media and to Lincoln Loan's customers in the course of inspections (Tr. 1334-35, 1458; Exs. 254-57). The City, particularly through Respondent City Commissioner Kafoury, instigated an Attorney General's investigation of Lincoln Loan for the sole purpose of harassing it and trying to put it out of business (Tr. 1391, 1692-93, 2149, 2482; Ex. 700). The stigmatizing statements were made deliberately, repeatedly, by more than one City official, and occurred over an extended period of time.

Further, the City orchestrated and publicized an unprecedented public meeting designed to disparage Lincoln Loan's business practices to its customers, and to induce its clients to sue it with the aid of "volunteer" lawyers supplied by the City (Tr. 404, 408-09, 1243, 2211, 2488; Exs. 35, 104, 255, 258). The City distributed a flyer to many Lincoln Loan customers, advertising this meeting, requesting the customers to bring their contracts for "review," telling them that their questions about the legality and propriety of their contracts would be answered, and suggesting that they should sue Lincoln Loan (Ex. 35, Tr. 2146-47). This meeting was the only assembly of its kind ever convened in the 150 year history of the City of Portland to discuss a single contract seller/mortgage lender (Tr. 409). A videotape of this unique gathering illustrated for the jury the City's contempt for Lincoln Loan and the obvious fact that the

meeting was designed specifically to turn Petitioner's customers against it, to encourage them to file lawsuits against it, and to drive it out of business (Ex. 104).

Further, the long-standing City enmity toward Lincoln Loan was so strong that, on instructions from Respondent Mr. Sweet, Respondent Mr. McKee violated a judicial restraining order entered after the commencement of this case which barred inspections of non-rental property in which Lincoln Loan held a contract seller's interest. Respondent Mr. McKee was held in contempt of court for his defiance of the court order (Tr. 1330-31, 1729; Ex. 156).

ARGUMENT IN SUPPORT OF ISSUANCE OF WRIT

A. EQUAL PROTECTION OF THE LAWS

Petitioner asks this Court to grant certiorari to clarify that malice-inspired governmental decision-making and associated administrative misconduct directed against a legitimate, if politically unpopular, business enterprise offends the Equal Protection guarantee of the Fourteenth Amendment under any standard of review, including the "rational basis" standard. The jury returned a verdict in favor of Lincoln Loan, based upon substantial evidence, under an instruction that a government violates the guarantee of Equal Protection if it ". . . acted in an arbitrary manner without any rational basis whatsoever for . . ." its actions (Tr. (Gianni) 207-08). The Oregon Court of Appeals overturned that verdict and resulting judgment and the

Oregon Supreme Court declined review. These courts ignored the record and the jury verdict and decided that Petitioner did not show that it was treated differently from other, similarly situated persons.[7] The state courts also disregarded the related propositions that governmental action inspired by malice is necessarily irrational and violates the guarantee of equal protection, and that singling out even "a class of one" for mistreatment cannot withstand constitutional scrutiny.

Earlier decisions from this Court have struck down ill-motivated state action against unpopular or disadvantaged groups, notwithstanding the Court's determination that no heightened level of scrutiny was appropriate. *E.g., Romer v. Evans*, 517 U.S. 620, 631-33, 116 S. Ct. 1620, 1627-28, 134 L. Ed. 2d 855, 865-66 (1996) (Colorado "anti-gay" amendment); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533-35, 93 S. Ct. 2821, 2825-26, 37 L. Ed. 2d 782, 787-88 (1973) ("anti-hippie" amendment to federal food stamp legislation). Recently, while confirming that "class of one" Equal Protection claims are legally cognizable, the Court stopped short of analyzing such claims on the basis of "subjective ill will" of the government actors. *Village of Willowbrook v. Olech*,

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[7] The Oregon Constitution decrees that a court of review may not reverse a jury verdict that rests upon any evidence. Oregon Constitution, Article VII (amended), § 3.

__ U.S. __, 120 S. Ct. 1073, 1074-75, 145 L. Ed. 2d 1060, 1063-64 (2000) (*per curiam*). *But see, id.*, (presence of "vindictive action," "illegitimate animus" or "ill will" distinguishes "run-of-the-mill zoning" proceedings from cases implicating Equal Protection considerations) (Breyer, J., concurring in result).

Here the jury must have found that the challenged City administrative actions were motivated by ill will toward Petitioner, and the City admits that the record contains evidence of "bad motivation" sufficient to support that verdict (Tr. 2780, Appendix I). Accordingly, this case squarely frames for review the issue left undecided in *Olech*. Lincoln Loan asks this Court to provide guidance in the "illegitimate animus" Equal Protection context presented here, and to hold that malicious government conduct injurious to the pursuit of one's livelihood will not be saved merely because the conduct possibly could have been lawful in the absence of ill will. Indeed, while this Petition implicates the level of scrutiny appropriate to an invasion of the ancient common law right to livelihood, Lincoln Loan suggests that government conduct impelled by ill will is per se irrational.

Moreover, this case affords the Court an opportunity to resolve a conflict between the Oregon state appellate courts and the United States Court of Appeals for the Ninth Circuit. In *Armendariz v. Penman*, 75 F. 3d 1311, 1327 (9th Cir. 1996) (*en banc*), the Federal

court held that a municipality violated the Equal Protection Clause where it targeted a person for enforcement of its housing code with a motive to deflate the value of that person's property, thereby enabling the city to purchase his property cheaply and replace it with a shopping center. The Federal court reached this result without requiring the injured property owner to show that others similarly situated were treated differently. In contrast, the Oregon Court of Appeals denied the guarantee of equal protection to Lincoln Loan by virtue of the [incorrectly] supposed absence of proof of differential treatment of others similarly situated. *Lincoln Loan Co. v. City of Portland, supra,* 158 Or. App. at 586, 976 P.2d at 67. Once again, court, counsel, and litigants require guidance since different results should not depend upon whether an action is commenced in state or federal court.

In addition, this Petition presents the Court with an opportunity to emphasize that Amendment XIV prohibits singling out one person for different and less favorable treatment while others occupying a similar position receive special favors and privileges. Here the evidence showed, to the satisfaction of the jury and the trial judge, that the City treated Lincoln Loan differently from all other mortgage lenders and all other contract sellers because the City disapproves Lincoln Loan's method of doing business. City officials did not attack any other mortgage lender or contract vendor by making

published false statements accusing them of fraudulent, criminal, and unethical conduct; neither did it intentionally inspect the homes of customers of any other mortgagee or contract seller without prior complaint; nor did it subject any other contract seller or mortgage lender to a public meeting exhorting customers and clients to file lawsuits aided by City-supplied volunteer lawyers. When the City singles out Lincoln Loan for malicious mistreatment because it dislikes the way that Petitioner exercises its constitutional interest in pursuing its lawful occupation, the City violates Lincoln Loan's right to equal protection of the laws. The jury and Circuit Court Judge accepted Lincoln Loan's proof in this regard. Petitioner asks this Court to do the same, and so provide guidance to the Oregon appellate courts and all other interested persons.

B. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment Due Process Clause prevents a government from abusing its power, or employing it as an instrument of oppression. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 1003, 103 L. Ed 2d 249, 259 (1989). A substantive due process claim rests upon the foundation that government officials have exercised their authority in an arbitrary, oppressive, or improper manner in derogation of a constitutionally protected interest. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S. Ct. 1708, 1716, 140 L. Ed 2d 1043, 1056-57 (1998).

Amendment XIV protects the right of all persons - including corporations - to pursue a livelihood unfettered by unreasonable state interference. This Court has continually recognized this right in its constitutional jurisprudence and has referred to it alongside those personal rights of the most fundamental nature. *See, Washington v. Glucksberg*, 521 U.S. 702, 758-62, 117 S. Ct. 2258, 2278-80, 138 L. Ed. 2d 772, 811-814 (1997) (Souter, J., concurring in judgment). Decisions prominent in this heritage include *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 17 S. Ct. 427, 431, 41 L. Ed. 832, 835-36 (1897) (acknowledging person's right to "earn his livelihood by any lawful calling; to pursue any livelihood or avocation," and invalidating state statute limiting participation in the insurance trade); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923) (*dicta*, recognizing the right "to engage in any of the common occupations of life"); *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-36, 45 S. Ct. 571, 573-74, 69 L. Ed. 1070, 1077-78 (1925) (invalidating state statute severely restricting the operation of private schools); *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377, 1388-89 (1959) (right to hold employment free from unreasonable government interference); and *Board of Regents v. Roth*, 403 U.S. 564, 572, 92 S. Ct. 2701, 2706-07, 33 L. Ed. 2d 548, 558 (1972) (reaffirming basic right to livelihood

principle).[8]

Indeed, this fundamental right to livelihood possesses a venerable pedigree. According to Lord Coke, the principle derives specifically from the 39th chapter of the Magna Carta. *See*, Edward Coke, 2 Institutes of the Laws of England 45 (1797) (Hein ed. 1986) (the prohibition against desseison encompasses unwarranted intrusions upon the pursuit of one's livelihood). As a consequence, "[n]o man ought to be put from livelihood without answer." *Id.* 46-47. Blackstone also suggests that a protected interest in pursuing an occupation derives from chapter 39 of the Magna Carta. *See*, William Blackstone, 1 Commentaries On The Laws Of England *138-39 (3d Cooley ed. 1884). One finds the historical protection accorded this right most clearly illustrated in, and definitively discussed by, the dissents of Justices Bradley and Field in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 90-124, 21 L. Ed. 394, 411-24 (1873). *See, Washington v. Glucksberg*, 521 U.S. at 758-59, 117 S. Ct. at 2278, 138 L. Ed. 2d at 811-12 (Souter, J., concurring). Justice Bradley emphasized that the right to livelihood

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[8] *See also*, James Madison, *Property*, The National Gazette, March 29, 1792, *reprinted in* 6 Writings 101 (G. Hunt ed., 1900-01) (right of property includes "the free use of [one's] faculties and free choice of the objects on which to employ them"), *cited in* Wayne McCormack, Economic Substantive Due Process and the Right of Livelihood, 82 Ky. L. J. 397, 402 n.31 (1994).

had been inherent in the concept of United States citizenship since the founding of the Republic and, with the adoption of the Fourteenth Amendment, the Constitution granted express protection to that right against abridgement by the states. *The Slaughter-House Cases, supra*, 83 U.S. (16 Wall.) at 119, 122, 21 L. Ed. at 422-23. Both Justice Bradley and Justice Field reviewed the historical lineage of this essential right, looking to Lord Coke and William Blackstone and back to the Magna Carta. *Id.*, 83 U.S. (16 Wall.) at 104-06, 110, 114-16, 21 L. Ed. at 417-21. As Justice Bradley observed:

> . . . . This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

Id., 83 U.S. (16 Wall.) at 116, 21 L. Ed. at 421.

Misunderstanding the essence and pedigree of the right to livelihood, the Oregon appellate courts overturned Petitioner's verdict by holding that a substantive due process violation of the right to livelihood requires a showing that the Petitioner has been wholly prevented from pursuit of its calling. *Lincoln Loan Co. v. City of Portland, supra*, 158 Or. App. at 583-84, 976 P.2d at 65-66. Seizing on some out-of-context language in this Court's recent opinion in *Conn v. Gabbert*, 526 U.S.

286, 292, 119 S. Ct. 1292, 1295-96, 143 L. Ed. 2d 399, 406 (1999), the City has argued on review (Response to Petition For Review 8-9) that this Court supports the singular conclusion that no matter the severity of invasion, no matter the depth of demonstrated malice, and no matter the considered opinion of a correctly instructed jury, a person abused by public servants pursuing a malice-tainted agenda cannot maintain a civil rights action unless his or her livelihood is completely destroyed beyond all recapture.

Conn v. Gabbert does not require a complete destruction of one's business existence to support a claim for violation of the constitutional right to livelihood.[9] Rather, the Court's analysis was limited in *Conn* to contrasting the brief interruption of an occupation, which occurred in that case, with precedents involving total prohibition, finding constitutional breaches in the latter category of case, but not the former. *Conn*, 526 U.S. at 292, 119 S. Ct. at 1296, 143 L. Ed. 2d at 406 (1999). In short, this Court described the extremes of the due process spectrum; it did not purport to analyze the

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[9] At the point in this Court's opinion cited by the City, the Court was explaining why the lower court erred in relying on certain authorities in upholding the plaintiff's claim, and it referred to those decisions solely to demonstrate that they were irrelevant to the issue presented. *Conn*, 526 U.S. at 292, 119 S. Ct. at 1295-96, 143 L. Ed. 2d at 406 (1999).

middle ground.[10] Petitioner asks this Court to clarify that one may establish a substantive due process violation of one's right to livelihood by showing a malicious abuse of government power infringing that right and causing harm to, but not complete destruction of, one's calling. Whether measured against a "shocks the conscience" standard or a historical analysis of citizens' constitutional interest in pursuit of a calling free from undue interference, the improperly motivated conduct found here cannot be permitted to stand.

Lincoln Loan urges that a substantive due process violation occurs either when governmental actions are not rationally related to a legitimate government interest, or when governmental conduct was in fact motivated by malice, bad faith, ill will, or other improper motive. It

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[10] In addition, different criteria are employed to identify violations of substantive due process, depending upon whether the challenge is to a legislative enactment or to the enforcement activities of the executive or administrative branch of government. *County of Sacramento v. Lewis, supra,* 523 U.S. at 846, 118 S. Ct. at 1716, 140 L. Ed. 2d at 1057 (1998). The courts judge the latter by whether they "infringe," "punish," or "deter" persons in the exercise of their constitutional rights. *Id. Conn v. Gabbert, supra,* adheres to that standard, recognizing that any "infringement" violates constitutional rights. *Conn,* 526 U.S. at 292, 119 S. Ct. at 1296, 143 L. Ed. 2d at 406 (1999).

further asserts that identical constitutional protections and analysis apply whether commerce is carried on in personal or corporate form.

Petitioner observes that the general questions presented concerning the level of scrutiny and the standard of review encompass important subsidiary inquiries. For example, how are these seminal questions affected when a government is able to postulate post hoc legitimate reasons for its conduct while simultaneously admitting that its actions were motivated or accompanied by malice? What if the municipality could justify some acts in the absence of malice (inspection of private homes) but not others (making repeated false and damaging statements, encouraging unmeritorious lawsuits, orchestrating a public meeting designed to injure Petitioner's livelihood) since the latter could never be rationally related to any legitimate government purpose? What effect does the verdict of an adequately instructed jury have on these general and subsidiary inquires, given the government's admission of malice?

Petitioner posits that the Fourteenth Amendment protects Lincoln Loan's right to engage in customary day-to-day dealings with its customers and clients, and to carry on its lawful enterprise even if some government servants disdain or disapprove of that activity. When government officials take action against private citizens with an improper motive - political, racial, or religious bias, personal dislike, or self-serving agenda - they

violate the right to substantive due process, and no amount of pretextual or after-the-fact rationalization can or should justify that misconduct. Malicious official conduct is irrational per se, and this Court ought to say so.

CONCLUSION

Petitioner prays this Court to grant its Petition, to clarify the constitutional right to engage in and maintain a livelihood free from malicious governmental abuse of power, and to compel the Oregon appellate courts to reinstate Petitioner's jury verdict. This case presents a concatenation of features enabling the Court to discourse on the civil rights to equal protection of the laws and substantive due process under the Fourteenth Amendment, to answer compelling questions arising out of governmental abuse of power directed against commercial interests, and to provide illumination to governments and citizens alike.

Respectfully Submitted,
Ridgway K. Foley, Jr., P.C.
Greene & Markley, P.C.

By Ridgway K. Foley, Jr.
Ridgway K. Foley, Jr., P.C.
Counsel of Record for Petitioner

Michael C. Zusman
Evans & Zusman, P.C.

APPENDIX A

Date of Entry: September 6, 1995

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff,	)	No. 9403-02151
v.	)	JUDGMENT
THE CITY OF PORTLAND, GRETCHEN KAFOURY, DAVID SWEET, AND MITCHELL MCKEE, Defendants.	)	

NOW, THEREFORE, based upon the verdict the Court enters Judgment as follows:

1. Judgment is entered in favor of plaintiff on its claim for interference with contract in the sum of $3,327.56 plus interest at the rate of 9% per annum from the date judgment is entered;

2. Judgment is entered in favor of defendant City of Portland on plaintiff's claims of defamation and civil conspiracy;

3. Judgment is entered in favor of plaintiff on its claim under 42 U.S.C. § 1983 for violation of its constitutional rights to substantive due process and equal protection in the sum of $2,750,000, plus interest at the rate of 9% per annum from the date judgment is entered;

4. Judgment is entered in favor of defendants Gretchen Kafoury, David Sweet and Mitchell McKee on plaintiff's claim under 42 U.S.C. §1983 on the basis of

qualified immunity.

5. Judgment is entered in favor of defendant City of Portland on plaintiff's claim under 42 U.S.C. § 1983 on plaintiff's claims for violation of Procedural Due Process under the Fourteenth Amendment, Inverse Condemnation under the Fifth Amendment and Excessive Fines under the Eighth Amendment to the United States Constitution.

6. Judgment is entered in favor of defendant City of Portland on plaintiff's claim for inverse condemnation based on Article I, § 18 of the Oregon Constitution.

7. Judgment is entered in favor of defendant on plaintiff's Declaratory Judgment Claim.

8. On plaintiff's claim based on Article I, Section 20 of the Oregon Constitution and on plaintiff's claim for injunctive relief pursuant to 42 U.S.C. § 1983, the jury finding that plaintiff's Federal Constitutional rights were violated, the Court finding that plaintiff's state constitutional rights were violated with respect to inspections of non-rental properties in which plaintiff had an interest under Defendant City's focused landlord inspection program (informally referred to as the "Dirty Dozen" rental inspection program) and the court concluding that plaintiff is entitled to the relief requested with regard to inspections of such non-rental properties, the court hereby grants injunctive relief, finding that because plaintiff has valid reason to believe that without injunctive relief, defendant City would further inspect its non-rental properties pursuant to its focused landlord inspection ("Dirty Dozen") program. Therefore, the court hereby rules as follows:

a.) The City of Portland is enjoined from intentionally or knowingly using the Dirty Dozen Program to inspect properties that are not rental

properties. Vacant lots are not rental properties. However, if during the course of inspecting rental properties under such program the City comes across violations of Title 29 in non-rental properties it may proceed to act upon those violations if otherwise authorized by law;

b.) The court declares that all assessments, fees, liens, and other associated charges and penalties imposed upon all of plaintiff's contract and mortgage properties pursuant to the Dirty Dozen Program are null and void if any such charges stemmed from an inspection that occurred after plaintiff's contract or mortgage interest in such property was duly recorded as required by law, including the filing of a memorandum of contract. Subsequent enforcement actions, including any "red tags", that are based on such inspections are likewise null and void;

c.) All assessments, fees, liens and other charges and penalties levied against plaintiff's properties are valid and remain in full force and effect if they stemmed from inspections that occurred before plaintiff's contract or mortgage interest was duly recorded as required by law.

d.) The request to enjoin enforcement of Section 29.70.110B(2) of the City Code is denied;

e.) The request to enjoin all proactive inspection programs that might be implemented to enforce the provisions of Title 29 of the Portland City Code is denied;

9. Plaintiff is further is [sic] entitled to seek an award of reasonable attorney fees pursuant to 42 U.S.C. § §1983 and 1988 and costs in this matter, which may be added by a supplemental judgment.

10. Nothing in this Judgment shall be construed to enjoin defendant city from inspecting any property in

response to a bona fide complaint or pursuant to a "proactive" inspection program providing sufficient indications of the purposes and limits of such inspections, and carried out pursuant to a properly authorized administrative program, designed and systematically administered to control the discretion of non-supervisory officers.

11. Based upon the parties' mutual agreement, the Court hereby awards prejudgment interest at the rate of 9% per annum on the sum of $2,753,327.56 from August 16, 1995 until the date judgment is entered.

MONEY JUDGMENT

1. Judgment Creditor: Lincoln Loan Co.
2. Judgment Creditor's Attorney: Jeffrey C. Bodie
3. Judgment Debtor: City of Portland
4. Amount of Judgment: $2,753.327.56
5. Interest and Service Charges Included in Judgment:
6. Prejudgment Interest Accrual Information:

Pre-Judgment interest is awarded at the rate of 9% per annum on the sum of $2,753,327.56 from August 16, 1995 until the date judgment is entered.

7. Post Judgment Interest Accrual Information:

Simple interest accrues at the rate of 9% per annum on the sum of $2,753,327.56 from the date judgment is entered until fully paid.

7.[sic] Costs Included in Judgment:
TO BE ADDED BY SUPPLEMENTAL JUDGMENT.

8. Attorney's Fees Included in Judgment:
TO BE ADDED BY SUPPLEMENTAL JUDGMENT.

DATED this 5 day of September, 1995.

/s/ Marshall L. Amiton
Judge of the Circuit Court

Submitted by:
James H. Van Dyke
OSB No. 78413

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff,	)	No. 9403-02151
v.	)	VERDICT
THE CITY OF PORTLAND, GRETCHEN KAFOURY, DAVID SWEET, AND MITCHELL MCKEE, Defendants.	)	

We, the jury, find:

1. Did Defendant intentionally interfere with Plaintiff's contractual relations with its purchasers?

Answer: (Yes) No (Circle one)

2. If your answer to question 1 was "yes," what amount of damages did Plaintiff suffer as a result of the interference?

Damages: $3,327.56 (Maximum: $40,753.93)

3. Did Defendant defame Plaintiff?

Answer: Yes (No) (Circle one)

4. If your answer to question 3 and "yes," what are Plaintiff's damages resulting from the defamation?

Economic Damages $_____ ($10,500 or -0-)

General Damages $_____ (Maximum: $5,000,000)

5. Did Defendant conspire with the Portland Housing Center to cause Plaintiff harm?

Answer: Yes (No) (Circle one)

6. If your answer to question 5 was "yes," what are Plaintiff's damages resulting from the conspiracy?

Economic Damages $_____ ($10,500 or -0-)

General Damages $_____ (Maximum: $5,000,000)

7. Did Defendant violate the civil rights law?

Answer: (Yes) No (Circle one)

If your answer to this question is "no," stop here. SIGN FORM.

8. If your answer to question 7 was "yes," which of the constitutional violations did the Defendant commit (Put an "X" by any one or both of the constitutional claims listed below)?

(a) Substantive due process [X]

(b) Equal Protection [X]

9. If you answered "yes" to question number 7, what are Plaintiff's damages resulting from the violation(s)?

Economic Damages	$0.00	($10,500 or -0-)
	$0.0	(Maximum: $40,753.93)
General Damages	$2,750,000	(Maximum: $5,000,000)

DATED: April 20, 1995.

/s/ Clarence E. Murbon
Presiding Juror

APPENDIX B

Filed: February 24, 1999

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

LINCOLN LOAN COMPANY,
an Oregon corporation,
Respondent - Cross-Appellant,

v.

THE CITY OF PORTLAND,
Appellant - Cross-Respondent,

and

GRETCHEN KAFOURY, DAVID SWEET and MITCHELL MCKEE,
Cross-Respondents.

(9403-02151; CA A90943)

Appeal from Circuit Court, Multnomah County.
Marshall L. Amiton, Judge.
Argued and submitted May 11, 1998.
Jeffrey L. Rogers, City Attorney, argued the cause for appellant and cross-respondents.
On the opening brief was Harry Auerbach, Deputy City Attorney. With him on the combined appellant's reply brief and cross-respondents' brief on cross-appeal was Harry Auerbach, Deputy City Attorney.
Jeffrey C. Bodie argued the cause for respondent-cross-appellant. With him on the brief were Michael C. Zusman and Grenley, Rotenberg, Evans Bragg & Bodie, P.C.
Before De Muniz, Presiding Judge, and Deits, Chief Judge, and Haselton, Judge.
DE MUNIZ, P.J.
On appeal, judgment in favor of plaintiff reversed on claims under 42 USC section 1983 for violation of plaintiff's equal protection and substantive due process

rights and claim under Article I, section 20, of the Oregon Constitution and otherwise affirmed; affirmed on cross-appeal.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

[ ] No costs allowed.

[X] Costs allowed, payable by: Respondent on appeal; cross-appellant on cross-appeal.

[ ] Costs allowed, to abide the outcome on remand, payable by:

DE MUNIZ, P.J.

Defendant City of Portland (City) appeals from a judgment entered on a jury verdict awarding plaintiff Lincoln Loan Company (Lincoln) $2,750,000 on its civil rights claim under 42 USC section 1983. Lincoln cross-appeals the directed verdict in favor of defendants Kafoury, Sweet, and McKee (individual defendants). We reverse on the appeal and affirm on the cross-appeal.

We view the facts in the light most favorable to Lincoln, in whose favor the jury found. *Brown v. J.C. Penney Co.*, 297 Or 695, 688 P.2d 811 (1984). Portland City Charter section 2-105(a)(35) grants City the power to "regulate the condition, care, use and management of buildings and structures in the City" for the protection of lives and health. City has adopted a housing code that sets the legal minimum standards for the condition of all residential properties within its boundaries, including rentals and owner-occupied housing. Portland City Code 29.05.030 (PCC). In 1991, a citizen task force, the Citizens Advisory Committee on Quality Rental Housing (CAC), was formed, in part to evaluate the basis of City's complaints for code violations. The members were appointed by defendant Kafoury and included defendant

Sweet, a City staff member. Kafoury directed CAC to find a new source to fund inspection programs necessary to correct pervasive, city-wide rental housing code violations. CAC determined that the existing enforcement system was inadequate and that many of the code violations were related to properties owned by a fairly small number of repeat offenders. CAC recommended that City should pursue the repeat offenders and that City should establish and publicize a list of 12 repeat offenders whose properties would be inspected to clean up numerous violations. The program was intended to target those landlords and their rental properties; contract sellers were not discussed. However, the PCC does not limit code inspections to rental properties, and "owners" of property include sellers and buyers of property under contract as well as landlords.[1] As a result of the recommendations, City revised its code to impose a $50 fee on properties when owners fail to complete repairs within 30 days after the property is cited for code violations. Unpaid fees become liens on the property, with priority over other liens.

The housing code is enforced by City's Bureau of Buildings. In late 1993, the Bureau implemented the proposed inspection program and assigned defendant McKee actively to inspect rental properties. McKee compiled a list of property owners, including them in the program if (1) the owner owned three or more properties; (2) there were two or more unresolved files with the Bureau; and (3) the owner showed a history of slow

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[1] "[O]wner" is defined as "[a]ny person, agent, firm or corporation having a legal or equitable interest in a property." PCC 29.10.020.

response to citations for code violations. The list came to be known as the "Dirty Dozen."[2] There was evidence that McKee was given minimal or no guidance for defining and applying the criteria but that he visually screened an owner's properties without issuing citations to verify current condition before undertaking inspections. In late 1993, City inspected the properties of four or five landlords that met the criteria. By December, 42 inspections had been completed and citations had been issued for several properties being sold on contract, as well as on rental properties.

In January 1994, Lincoln was included in the Dirty Dozen. It was the first large property owner selected for the list, and no other mortgagee or contract seller of numerous properties was in the Dirty Dozen. McKee was "not sure" whether he had decided to include Lincoln in the Dirty Dozen before he reviewed Lincoln's 12 open files, eight of which were for nonrentals. Lincoln, run by Steve Benson and Melinda Wilde,[3] had a decades-long history of disputes with City. In recent years, Lincoln has focused on selling "fixer upper" properties in "as is" condition to persons of limited means or who could not qualify for conventional home mortgage financing. Lincoln provided financing using land sale contracts. At the time of trial, Lincoln had 20 to 30 rental houses, 111 houses being sold on contract, and 67 properties on which

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[2] In response to the question whether a Dirty Dozen program was implemented, Kafoury testified, "We didn't call it that, but that was the generic name, I guess."

[3] Lincoln was formerly run by Harry Benson, who died in 1993. Benson and Wilde are his children.

it held mortgages.

Lincoln's customary practice with potential contract purchasers is to ask them about their ability to make the repairs that the properties requires and to encourage them to walk through properties to assure that the purchasers have the ability to make the repairs. After inspection and a sale is agreed on, Lincoln prepares a form contract and typically includes a note that the houses have "known deficiencies." Some of the contracts do not warrant the structural soundness of the dwelling and others acknowledge violations of the PCC. Although buyers promise to make the needed repairs, they cannot always do so, and properties may be returned to Lincoln for resale, a process sometimes repeated several times on the same property. Lincoln failed to record land sale contracts about 60 percent of the time. In that instance, the buyer's name will not appear on the computer records.

McKee's visual inspection of the exteriors of the 12 Lincoln properties that were indicated as "open files" revealed violations in all cases. He then obtained a computer printout of houses owned by Lincoln and visually screened an additional 30 properties, "a lot" of which he determined were in need of repair. City then began to inspect all properties Lincoln owned, as defined by the PCC. A large number turned out to be properties that Lincoln was selling on contract rather than rentals. Benson told City that it was improper to inspect properties other than rentals and offered to document which Lincoln properties were rentals, contract sales or mortgages. City's response was that it "didn't care" and would inspect the properties if Lincoln had an interest in them. Sweet acknowledged that City extended the program from a landlord inspection to include inspection

of contract properties because Lincoln was a "special case." McKee admitted to Wilde that "there was something else behind the scenes that was going on" and that he knew that some of the buyers would get hurt. City inspected Lincoln's properties for 15 months, longer than anyone else's properties. Abut 51 of Lincoln's more than 200 properties were issued citations for violations of the code and another 17 received nuisance violations for other code violations.

During the inspection, articles ran in *The Oregonian* and in the *Business Journal*, quoting from City sources and suggesting that Lincoln was defrauding its customers and engaging in unlawful trade practices. City also reported Lincoln's failure to record its contracts to the Attorney General, who subsequently investigated Lincoln. City also held a meeting that was attended by representatives of the Attorney General's office, volunteer lawyers, and buyers. However, at the meeting, buyers turned on City representatives, expressing anger at the inspections and the refusal to allow them latitude to improve the homes that they had purchased from Lincoln.

It is undisputed that Lincoln's properties were in need of repair and maintenance and clearly violated the code. At trial, there was testimony from an investigator employed by the state attorney general's office that half of the 36 Lincoln properties the investigator had chosen at random were in "deplorable" condition in 1994 with visibly rotting exteriors, missing siding and missing windows. Some were in such "absolutely horrible" condition that he did not approach the house at all. Benson admitted to a City employee that Lincoln kept ownership of its better properties and sold the remainder to avoid landlord maintenance obligations. However, at trial, several property owners testified that they were

grateful for the opportunity Lincoln had given them to take a distressed property and make it a home with increased market value.

Lincoln brought this action against City, seeking declaratory and injunctive relief and damages on several theories: tort claims for interference with contractual relations, for defamation and for civil conspiracy; a federal civil rights claim under 42 USC section 1983 for violation of due process and equal protection rights under the Fourteenth Amendment; a claim for violation of the equal treatment guarantee in Article I, section 20, of the Oregon Constitution; an inverse condemnation claim and a claim seeking a declaration that Title 29 of the PCC is invalid and unconstitutional.[4] We consider only the constitutional claims in this appeal. In those, as Lincoln states, its "central theme at trial was the impropriety of [City's] malice-inspired effort to drive [Lincoln], and [Lincoln alone], out of business."

The trial court directed a verdict in favor of the individual defendants on the section 1983 claims on the ground of qualified immunity and for City on Lincoln's procedural due process claim. The jury returned a verdict finding that City had violated Lincoln's

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[4] Lincoln's state law tort claims were asserted only against City. The jury found in favor of City on Lincoln's defamation claim and in favor of Lincoln on its intentional interference with contractual relations claim, awarding damages of $3,327.56. On Lincoln's declaratory judgment claim, the trial court entered judgment for City, upholding the constitutionality of City's housing code. It allowed City's motion for a directed verdict on Lincoln's takings claim.

substantive due process and equal protection rights. It awarded Lincoln $2,750,000 in general damages on its section 1983 claim. The Article I, section 20, claim was submitted to the court, which, in the light of the jury's verdict, ruled in favor of Lincoln. City's motions for judgment notwithstanding the verdict and for a new trial were deemed denied 55 days after entry of judgment. ORCP 63; ORCP 64.

We turn first to City's assignments of error regarding Lincoln's substantive due process claim.[5] City assigns error to the court's denial of its motions for judgment on the pleadings and for a directed verdict on that claim. In reviewing a motion for judgment on the pleadings, we determine whether the pleadings, taken together, affirmatively show that plaintiff has no cause of action against the defendant. *Scott & Payne v. Potomac Ins. Co.*, 217 Or 323, 330, 341 P2d 1083 (1959). We review the denial of a motion for directed verdict in the light most favorable to Lincoln to determine if there was sufficient evidence to submit the claim to the jury. *Devaux v. Presby*, 136 Or App 456, 459, 902 P2d 593 (1995). Considering those assignments together, see ORAP 5.45(6), we hold that, assuming that Lincoln alleged interference with a protected interest, it did not prove a constitutional violation of that interest.

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[5] We do not separately address City's assignments of error relating to the inclusion of general damages in the verdict on the constitutional claims or to the court's denial of a new trial on those claims. However, we do consider both City's arguments and Lincoln's responses on those assignments insofar as they relate to the substantive due process issue. *See* ORAP 5.45(6).

Section 1983 is not a source of substantive rights but a method for vindication of federal rights elsewhere conferred. *Baker v. McCollan*, 443 US 137, 144 n 3, 99 S Ct 2689, 61 L Ed 2d 433 (1979). The first step in analyzing a section 1983 claim is to identify the specific constitutional right allegedly infringed. *Graham v. Connor*, 490 US 386, 394, 109 S Ct 1865, 104 L Ed 2d 443 (1989). City argues that Lincoln failed to identify an interest protected by the Due Process Clause. City argues, moreover, that even if Lincoln asserted such an interest, it is an economic or property interest and that the deprivation of such an interest is not redressable unless the governmental action is arbitrary and unreasonable with no substantial relation to public health or safety. *Village of Euclid v. Ambler Realty Co.*, 272 US 365, 395, 47 S Ct 114, 71 L Ed 303 (1926). Thus, City contends, where, as here, the government has acted on the basis of circumstances that do, in fact, exist, the government's motive for its actions is irrelevant. *D.C.A. Development Corp. v. Ogden City Mun. Corp.*, 965 F2d 827, 829 (10th Cir 1992).[6]

Lincoln argues that it alleged a violation of its right to a livelihood and that deprivation of that right has been recognized as coming within due process protection. *See Schware v. Board of Bar Examiners*, 353 US 232, 238-39, 77 S Ct 752, 1 L Ed 2d 796 (1957) (Due Process Clause protects liberty or property interest in pursuing the common occupations or professions of life). Lincoln argues that that right extends here to Lincoln, a corporation. *See San Bernardino Physicians' Services Medical Corp., Inc. v. San*

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[6] Lincoln has raised several arguments that City failed to preserve its claims of error. On reviewing the record, we find the issues preserved.

Bernardino County, 825 F.2d 1404, 1407 (9th Cir 1987) ("'A corporation *** is a 'person' possessing Fourteenth Amendment due process rights.'" (citing *First National Bank v. Bellotti*, 435 US 765, 98 S Ct 1407, 55 L. Ed 2d 707 (1978)). Moreover, Lincoln contends, such an interest is "fundamental," requiring strict scrutiny of any governmental interference. *See, e.g., Meyer v. Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042 (1923) (liberty guaranteed by Due Process Clause denotes, inter alia, right to engage in any of the common occupations of life). Therefore, Lincoln argues, "relevant" case law shows that, to prove a substantive due process violation here, all it had to prove was governmental action with an improper motive,[7] and, once that showing is made, no amount of "after-the-fact rationalization" will justify the governmental action.

Lincoln alleged that City acted "with the intent to cause economic damage to [Lincoln] *** and, ultimately, to drive [Lincoln] out of business[.]" For purposes of this opinion, we assume, without deciding, that Lincoln sufficiently alleged a constitutional interference with the

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[7] Lincoln presented evidence in support of its position that the City targeted it: (1) City disseminated disparaging information about Lincoln to the media and to Lincoln's customers during the course of the inspections; (2) City instigated the Attorney General's investigation of Lincoln; and (3) City orchestrated the meeting for Lincoln vendees in order to "undermine" the confidence of the purchasers.

right to pursue a livelihood,[8] and that, at trial, Lincoln adduced evidence from which the jury could conclude that City acted with malice in listing Lincoln as one of the Dirty Dozen and in inspecting properties that were not rental properties.[9] Nevertheless, we reverse the judgment

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[8] *But see Patel v. Penman*, 103 F3d 868 (9th Cir 1996), where the gravamen of plaintiffs' claim was that, in closing plaintiffs' motel because of code violations, the city had acted to drive the motel out of business. The court refused to allow the plaintiffs to bring their action as a substantive due process claim. In so holding, the court relied on the United States Supreme Court's holding in *Albright v. Oliver*, 510 US 266, 273-74, 114 S Ct 807, 127 L Ed 2d 114 (1994), that, where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment and not the more generalized notion of substantive due process must be the guide for analyzing the plaintiff's claim. The *Patel* court concluded that the substantive due process claim was preempted by the Fifth Amendment's Takings Clause. City argues that Lincoln's claim here is also one for a taking. However, it is not entirely clear where – or if – that theory was presented to the trial court and, because we determine that Lincoln failed, as a matter of law, to prove a substantive due process claim, we do not address City's taking arguments.

[9] Lincoln takes the position that "relevant" case law shows that, once it proved that City acted with malice, any rational basis for City's actions became irrelevant.

on the section 1983 claims because, as City argues, Lincoln failed to prove a constitutionally cognizable deprivation of its claimed right to pursue its livelihood. City argues particularly that

> "a desire to deprive would not, in the absence of an actual deprivation, be a constitutional violation. The Constitution protects against real deprivations of enumerated rights, not against 'bad thoughts.' "[E]motion, even if the emotion spills over into active dislike, does not generate a federal constitutional case unless real and serious harm is the result. That never came close to being shown in this case. Plaintiff made no showing that it ever lost any business, let alone all of its business, because of anything the City did."

Lincoln does not argue that it proved that City's actions prevented it from pursuing its business, and, indeed, admits that City "had not really taken, in a concrete sense, any property from [Lincoln]." As we

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See Begnini v. City of Hemet, 879 F2d 473 (9th Cir 1988) (owner of bar alleged that police harassment caused him to sell his bar at a loss); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F3d 685, 692 (3d Cir 1993) (substantive due process violation proven if government's actions were, in fact, motivated by bias, bad faith or improper motive). Because of our determination that Lincoln failed to proved [sic] a constitutional deprivation of its claimed right, we do not decide whether those cases support Lincoln's proposition that bad faith conduct alone can lead to government liability as opposed to showing that the government's purported rational basis was merely pretextual.

understand Lincoln's argument, it contends that it need not make that proof because once it showed that City acted with an improper motive, "it is axiomatic that grievous, if not irreparable, harm to the business's reputation will result." Lincoln's position is that City's "disparaging statements," its conduct and its "unlawful targeting of Lincoln" resulted in "intangible harm"[10] from a loss of reputation,[11] and that monetary damages could therefore be presumed as they are in defamation.

However, Lincoln's claim is not one for

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[10] Lincoln argues that the "intangible harm" included the "unlawful targeting of Lincoln" that directly related to the attorney general's investigation. Lincoln contends that evidence showing that buyers became concerned about working with Lincoln and, in one instance, purchasing property outside the city, also demonstrates "intangible harm."

[11] We do not understand Lincoln to be arguing that City violated a protected constitutional interest in its reputation, and, indeed, it could not make that claim. *See Noble v. Board of Parole*, 327 Or 485, 494, 964 P2d 990 (1998) ("*Paul v. Davis*, 424 US 693, 96 S Ct 1155, 47 L Ed 2d 405 (1976), and *Siegert v. Gilley*, 500 US 226, 288, 111 S Ct 1789, 114 L Ed 2d 277 (1991), have made it clear that, by themselves, reputational interests alone are not 'liberty' interests within the meaning of the Due Process Clause and do not merit due process protections."). As we understand Lincoln's argument, it is that City's action diminished Lincoln's reputation, thereby violating its right to pursue its livelihood.

defamation[12] but for a violation of section 1983. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law," and when the claim is for violation of the right to pursue a livelihood, at a minimum, the plaintiff must show an inability to pursue the occupation or business. Deprivation of that right is not presumed.[13]

In *Federal Deposit Ins. Corp. v. Henderson*, 940 F2d 465, 474 (9th Cir 1991), a former bank president alleged a violation of his substantive due process right to pursue the occupation of his choice. The court noted that he must show, not just that he was unable to pursue his profession in a particular bank, but that he was unable to pursue a job in the banking profession. In *DiMartini v. Ferrin*, 889 F2d 992, 927 (9th Cir 1989), the court confirmed

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[12] In Lincoln's defamation claim, it alleged that City's "statements" were defamatory by tending "to subject Lincoln to ridicule, contempt, and to diminish Lincoln's esteem, respect, business goodwill, confidence and ability to conduct its business and generally prejudiced Lincoln in its business affairs." The jury found for City on that defamation claim. Lincoln contends that that finding does not undermine the award on the constitutional claim because the "elements of the respective claims are different" and it is "inappropriate" to speculate on the jury's decision.

[13] Because we do not find that Lincoln made that minimum showing, we do not decide what Lincoln would have to establish to convert what appears to be a tort claim for defamation into a claim for a violation of substantive due process.

a summary judgment on the plaintiff's substantive due process claim of interference with right to pursue future employment when the plaintiff's complaint contained no specific allegation that he was blacklisted in the casino industry where he had worked or was otherwise blocked in pursuing the career of his choice and where there was no evidence that governmental action would have that effect on his future. In *Wedges/Ledges of California v. City of Phoenix, Ariz.*, 24 F3d 56 (9th Cir 1994), the plaintiffs were the manufacturer, distributors and former owners of an arcade amusement game. The City of Phoenix revoked the licenses for some approved machines and imposed a ban on new ones for about five months. The plaintiffs brought an action alleging, inter alia, a substantive due process violation of their right to pursue the occupation of their choice. 24 F.3d at 65. The Ninth Circuit noted that, in addition to showing that the governmental action lacked a rational basis, the plaintiffs must establish that they were deprived of the right to pursue their business, *id.*, and that they failed to do so:

> "As an initial matter, we note that the fact that the City temporarily banned one particular type of amusement game does not in itself establish that the City unduly interfered with either the game operators' or manufacturer's ability to pursue their livelihood in the amusement game industry." *Id.* (emphasis added).

See also Waddle v. Forney, 108 F3d 889, 895 (8th Cir 1997) (in claim that includes injury to one's reputation, constitutional deprivation required to be shown is that the publication must prevent one from obtaining future employment, not merely damage to one's reputation).

Although Lincoln points to disparaging comments made by defendant's employees that, it contends, had a

"negative" impact,[14] it does not argue that the claimed negative impact prevented it -- even temporarily -- from pursuing its business.[15] Insofar as the evidence showed, Lincoln continued to rent and sell properties. Lincoln failed to prove that City's actions resulted in a constitutional deprivation. The trial court erred in denying City's motion for a directed verdict on Lincoln's substantive due process claim.

City also assigns error to the trial court's denial of its motion for a directed verdict or for a peremptory instruction on Lincoln's equal protection claim. City argues that, to prevail on its claim, Lincoln had to show that all persons similarly situated were not treated alike, *Cleburne v. Cleburne Living Center, Inc.*, 473 US 432, 439, 105 S Ct 3249, 87 L Ed 2d 313 (1985), and that Lincoln failed to do so. City argues that it is undisputed that

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[14] Lincoln points to buyers: the Covers, who felt it was necessary to explore alternative financing for their home; Schwartz who sought other financing; and Weirsch who signed an estoppel deed back to Lincoln that expressly recited that it was given as the result of an inspection and the inability to make required repairs within 30 days. Melinda Wilde testified that "at least 20 people" called in response to house sale advertisements but hung up when they learned that Lincoln was the seller and that that had never happened before City's media campaign against Lincoln.

[15] Indeed, there is evidence to the contrary. Lincoln's buyers testified that they "always kept faith with Lincoln Loan" and that Lincoln had been "straightforward in their dealings."

Lincoln is a landlord, as were the other property owners included in the inspection program, and that Lincoln did not show evidence of similarly situated contract sellers -- *i.e.*, those who met the criteria for the inspection program because they owned rentals, as well as sold on contract -- whose properties were not inspected.

Although Lincoln acknowledges that equal protection claims require proof that a plaintiff was singled out among similarly situated entities, it again responds by asserting that equal protection claims "share the element of improper government motive" with substantive due process claims. Thus, it argues, its equal protection claim does not challenge being included in the landlord inspection but, rather, its being labeled a Dirty Dozen property owner and City's use of a rental inspection program against Lincoln's nonrentals. However, those objections do not show that plaintiff was treated differently from others similarly situated.[16] Lincoln points to no evidence that other contract owners were not included in the program,[17] and it failed to prove that the law was not being enforced against other property owners who had pervasive violations. The trial court erred in denying City's motion for a directed

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[16] In fact, there was evidence that City had cited violations under the program at several properties being sold on contract by another owner.

[17] Lincoln asks us to take "judicial notice" from county records that there are many other contract sellers of residential property in Portland. Even if we did, Lincoln does not explain how that shows disparate treatment towards Lincoln here.

verdict or peremptory instruction on Lincoln's equal protection claim. *But see Hunter v. City of Eugene*, 309 Or 298, 303, 787 P2d 881 (1990) (Oregon's Bill of Rights provides no textual or historical basis for implying a right to damages for constitutional violations).

City also assigns error to the trial court's finding that it violated Article I, section 20, of the Oregon Constitution.[18] Lincoln framed its claim and analysis in terms that are identical to those advanced with respect to the federal equal protection claim. *But see Crocker and Crocker*, 157 Or App 651, ___ P2d ___ (1998); *Tanner v OHSU*, 157 Or App 502, ___ P2d ___ (1998) (both describing proper analysis under state constitution). Given the fashion in which the parties here have presented the issue, and in light of the foregoing discussion, we conclude that the court erred in finding that City violated Article I, section 20, for the reasons discussed under Lincoln's equal protection claim.

From our disposition, it follows that Lincoln's request for an award of attorney fees pursuant to 42 USC section 1988(b) is denied. Also, because of our disposition, we need not separately address City's remaining assignments of error.

We turn to Lincoln's two cross-assignments of

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[18] City argues that Lincoln's claim should have been brought by writ of review. ORS 34.040. However, Lincoln is not challenging the citations but its listing as one of the Dirty Dozen. Assuming that the decision to include it was a "quasi-judicial" one, Lincoln does not challenge the decision on any of the grounds set out in ORS 34.040(1)(a)-(e). *See Ettner v. City of Medford*, 155 Or. App. 435, 963 P2d 149, *rev den* 328 Or 40 (1998).

error, only the first of which requires discussion.[19] Lincoln argues that the trial court erred in dismissing its procedural due process claim arising from City's "improper designation of [Lincoln] as a Dirty Dozen target." Lincoln argues that "a procedural due process claim is established where one is subject to a designation by the government without notice and an opportunity to be heard, and the designation results in both an injury to reputation and a change in legal status." *Paul v. Davis*, 424 US 693, 96 S Ct 1155, 47 L Ed 2d 405 (1976). Lincoln contends that the only question before us is the change in Lincoln's legal status because, at the time the trial court granted the directed verdict against the procedural due process claim, it had rejected City's directed verdict motions on substantive due process. Therefore, Lincoln contends, injury to reputation was shown. Although Lincoln is incorrect that the only argument under this assignment that we may address is legal status, *see State v. Hitz*, 307 Or 183, 188 766 P2d 373 (1988), we limit our discussion to that argument because it is dispositive.

In Paul, the Supreme Court explained the nature of a change in legal status:

> "[T]he governmental action taken in [*Wisconsin v. Constantineau*, 400 US 433, 91 S Ct 507, 27 L Ed 2d 515 (1971),] deprived the individual of a right previously held under state law -- the right to purchase or obtain liquor in common with the rest of the citizenry. 'Posting' therefore,

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[19] By this assignment, Lincoln seeks reversal of the court's decision in the event that we reverse the court's judgment. ORAP 5.57(2)(b).

> significantly altered his status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 US at 708-09.

Lincoln contends that the designation in the Dirty Dozen changed it from "one of many contract vendors and lenders whose properties were inspected if complaints were made to the only one against whom an invidious and proactive course of conduct with a vastly different impact was directed, to the detriment of its protected interests."

Lincoln's protest, however, does not explain how including it in the inspection program deprived it of a right it previously held under state law.[20] As City points out, although the listing changed the manner of code enforcement, it did not change City's right to enforce its housing maintenance code against any and all offending properties.[21] Lincoln did not identify a change in legal status requiring predesignation procedures. The trial court did not err in directing a verdict against the

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[20] Lincoln argues that it could no longer sell houses "as is." That argument misses the point. Selling a property "as is" is not the same as complying with minimum standards required for residential properties in the City of Portland.

[21] A procedure was in place whereby Lincoln could challenge a notice of violation before any assessment, fine or lien became final.

procedural due process claim.[22]

On cross-appeal, Lincoln assigns error to the trial court's allowing the motions of individual defendants dismissing the federal constitutional claims against them on the ground of qualified immunity. Lincoln's assignment is implicitly and adversely answered by our holding that Lincoln failed to prove the constitutional claims.

On appeal, judgment in favor of plaintiff reversed on claims under 42 USC section 1983 for violation of plaintiff's equal protection and substantive due process rights and claim under Article I, section 20, of the Oregon Constitution and otherwise affirmed; affirmed on cross-appeal.

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[22] The Oregon Supreme Court's recent opinion in *Noble* considered the process due the petitioner before he could be designated as a predatory sex offender. It concluded that the public label of belonging to a certain undesirable group, when the governmental agency "must by law gather and synthesize evidence outside the public record" in making the designation required predesignation procedures under the Due Process Clause. 327 Or at 495-96. Here, inclusion on the inspection list was not mandated by evidence gathered outside the public record. PCC sets out conditions that violate the code, and owners were selected for the list on the basis of having three or more properties, two or more unresolved files with the Bureau of Buildings, and a history of slow response to citations for code violations.

APPENDIX C

Date of Entry: July 14, 1999

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff-Respondent, Cross-Appellant, v. THE CITY OF PORTLAND, Defendant-Appellant Cross-Respondent, and GRETCHEN KAFOURY, DAVID SWEET and MITCHELL MCKEE, Defendants, Cross-Respondents.	) Multnomah County) Circuit Court No.) 9403-02151)) CA A90943)) ORDER DENYING) PETITION FOR) RECONSIDERA-) TION))

Respondent cross-appellant has filed a petition for reconsideration of the Court's decision dated February 24, 1999, pursuant to ORAP 6.25(1)(e) and a request for reargument of the case for the limited purpose of considering the substantive due process issue.

The petition and request for reargument are denied.

/s/ PAUL J. DEMUNIZ
PAUL J. DEMUNIZ
PRESIDING JUDGE
July 14, 1999
Date

c: Michael C. Zusman
Harry Auerbach

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMIN., RECORDS SECTION, SUPREME COURT BLDG., 1163 STATE ST. SALEM, OR 97310

APPENDIX D

Date of Entry: March 21, 2000

IN THE SUPREME COURT
OF THE STATE OF OREGON

LINCOLN LOAN COMPANY	)
Respondent-Cross-Appellant	) ORDER DENYING
Petitioner	) REVIEW
v.	)
CITY OF PORTLAND	) CA A90943
Appellant-Cross-Respondent	) SC S46942
Respondent	)
GRETCHEN KAFOURY	)
Other/Respondent	)
DAVID SWEET	)
Other/Respondent	)
MITCHELL MCKEE	)
Other/Respondent	)

The Court has considered the petition for review and orders that it be denied.

DATE: March 21, 2000.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

MICHAEL CHARLES ZUSMAN	Attorney for Respondent-Cross-Appellant Petitioner
RIDGWAY K. FOLEY, JR.	Attorney for Respondent-Cross-Appellant Petitioner
HARRY AUERBACH	Attorney for Other/Respondent

APPENDIX E

Date of Entry: July 5, 2000

IN THE SUPREME COURT
OF THE STATE OF OREGON

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff-Respondent, Cross-Appellant, Petitioner on Review,	) Multnomah County) Circuit Court) No. 9403-02151) SC S46942) CA A90943
v.	)
THE CITY OF PORTLAND, Defendant-Appellant, Cross-Respondent, Respondent on Review,	))))
and GRETCHEN KAFOURY, DAVID SWEET and MITCHELL MCKEE, Defendants, Cross-Respondents, Respondents on Review.	) ORDER DENYING) RECONSIDERA-) TION)))

Upon consideration by the court.

The Court has considered the petition for reconsideration and orders that it be denied.

Dated this 5th day of July 2000.

/s/ GEORGE A. VAN HOOMISSEN
GEORGE A. VAN HOOMISSEN
PRESIDING JUSTICE

c: Michael Charles Zusman
Ridgway K. Foley Jr.
Harry Auerbach

APPENDIX F

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff,	)	No. 9403-02151
v.	)	FOURTH AMENDED COMPLAINT (Interference with Contract; Defamation; Civil Conspiracy; 42 U.S.C. § 1983; Inverse Condemnation; Declaratory Judgment) DEMAND FOR JURY TRIAL
THE CITY OF PORTLAND, GRETCHEN KAFOURY, individually, DAVID SWEET, individually, and MITCHELL MCKEE, individually, Defendants.	)	

Plaintiff alleges as follows:

GENERAL ALLEGTIONS

1.

Plaintiff Lincoln Loan Company ("Lincoln" or "Plaintiff") is an Oregon corporation with its principal place of business is Portland, Multnomah County, Oregon. Plaintiff owns approximately 30 rental units, has mortgages on approximately 53 properties, is selling approximately 120 properties on contract, and owns approximately 37 vacant lots.

2.

Defendant City of Portland is a municipal corporation located in Multnomah County, Oregon. Defendant Gretchen Kafoury is a commissioner of the City of Portland, and is in charge of the Bureau of

Buildings. Defendant David Sweet is a supervisor of housing inspectors for the Bureau of Buildings. Defendant Mitchell McKee is a housing inspector.

3.

Ever since their enactment, and prior to September, 1993 enforcement of nuisance and building codes, as set forth in Titles 18, 24 and 29 of the Code of the City of Portland, has occurred in response to complaints from neighbors and residents of properties having alleged violations. In or about September, 1993, Defendant Kafoury, Defendant Sweet and their staff adopted a plan of inspection targeting what Defendants described as the owners of "unsafe rentals" within the City of Portland. The plan was alleged to be targeted at landlords who owned three or more properties, and who had been slow in the past to respond to notices of code violations issued by the Bureau of Buildings as a result of complaints. Defendants Kafoury and Sweet stated the City no longer intended to wait for residents or neighbors to complain about properties with alleged violations, but would instead inspect residential dwelling properties owned by the above-described landlords. Defendants called this plan the "Dirty Dozen" landlord inspection program (also referred to hereafter as the "landlord inspection program" or "program"). Defendants said the City had prepared a list of such target landlords, and in fact such a list was prepared and captioned the "Dirty Dozen."

4.

Thereafter, Defendants began the aforesaid inspection program of several landlords in late 1993. Defendants entered and inspected rental dwellings for building code violations, and issued notices requiring that violations be corrected within 30 days or the owner

would be assessed fines and penalties.

5.

In January, 1994, Defendants informed Plaintiff that Defendants had decided to include Plaintiff as a target in the Dirty Dozen landlord inspection program. Defendants further informed Plaintiff that such inspections of its properties would not be limited to rental dwelling units, but would include all properties in which Plaintiff had any interest whatsoever, including vacant lots owned by Plaintiff, properties in which Plaintiff had only a vendor's security interest, and properties in which Plaintiff had only a mortgagee's interest. Plaintiff was informed that Defendants would institute enforcement of any nuisance or building code violations, as set forth in Titles 18, 24 and 29 of the Code of the City of Portland, that might be discovered as a result of inspections made pursuant to the Dirty Dozen inspection program. The actions and conduct of the individual Defendants as alleged in this Complaint were within the course and scope of their employment.

6.

Properties in which Lincoln has a vendor's interest or a mortgagee's interest and vacant lots should not be subject to the landlord inspection program. Defendants, while contending they intend to require landlords to remedy code violations, are also acting to damage Lincoln economically, to cause forfeitures of Lincoln's mortgagee and vendor interests in properties, to force Lincoln to sell its interest in lots and properties to third parties and, ultimately, to put Lincoln out of business. Defendants have also acted to cause forfeiture of Plaintiff's vendor or mortgagee's interests by assessing liens on properties in which Plaintiff has an interest, which liens have priority over Plaintiff's liens.

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10.

Defendants were aware of the contractual relations between Plaintiff and its contract vendees and Plaintiff and its mortgagors. Defendants have intentionally interfered with Plaintiff's contractual relations with its vendees and mortgagors. Defendants have acted with improper motives in one or more of the respects previously alleged in paragraphs 6 and 8 or those stated below:

A. Subjecting Plaintiff's vendees and mortgagors to economic duress by promising or strongly suggesting that financial assistance via home repair loans was available through the Portland Development Commission ("PDC") and in making such statements without knowing whether financial assistance was available, for the purpose of encouraging the vendees and mortgagors to sue Plaintiff and to thereby put Plaintiff out of business;

B. Defendants lacked any intention of directing PDC to loan money to Plaintiff's vendees or mortgagors even though Defendants had authority or ability to do so;

C. Causing Plaintiff to suffer economic duress such that Plaintiff would be forced to sell properties in which it had an interest to others, including city-controlled or assisted low income housing agencies, at reduced prices;

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E. By inspecting only Plaintiffs' mortgage and contract properties and not those of other lenders or contract sellers under the landlord inspection program; and

F. By giving only 30 days, an unreasonably short time period, within which to make repairs before assessing fines and penalties.

G. By targeting Plaintiff under the landlord inspection program with regard to the properties Plaintiff has sold under contract or mortgage, despite the fact that the expressed purpose of the Program was to cause code violations in certain rental properties to be remedied, with the intent to cause economic damage to Plaintiff, to cause forfeitures of Plaintiff's mortgagee and contract vendor interests in properties, to cause Plaintiff to be forced to sell its interests in the properties to third parties, and, ultimately, to drive Plaintiff out of business;

H. Inspecting one of the properties in which Plaintiff has a mortgagee's or vendor's interest in violation of a Temporary Restraining Order issued by this Court;

I. In general, conducting a vendetta against Lincoln to deprive Lincoln of its property interests based on disagreement with the manner by Plaintiff conducts its business, i.e. selling "fixer-upper" properties in "as-is" condition to people who Defendants believe should not be allowed to purchase homes.

11.

Additionally, or in the alternative, Defendants have further used improper means in interfering with Plaintiff's contracts and mortgages as aforesaid, by engaging in conduct described in one or more of the particulars previously alleged in paragraphs 8 through 10 hereof or those set forth below:

A. By making "proactive" inspections and searches under the landlord inspection program of properties of Lincoln's vendees or mortgagors and citing such properties even though such properties are not rental properties and even though no written policies or directives authorized inspections of non-rental properties;

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C. By requesting that representatives of the Attorney General's office be present when Defendants were inspecting properties of Lincoln's contract vendees or mortgagors; all for the purpose of causing Lincoln's contract purchasers and mortgagors to not perform their contracts or to cause Lincoln to forfeit its interest in the properties or to cause Lincoln to sell its property interests.

D. Including, as part of Title 29 of the Portland City Code (as amended in 1993) and the Dirty Dozen Program, an unreasonably short period of time (thirty days) in which post-inspection repairs to targeted properties had to be made (before enforcement and associated fees, interest thereon, and penalties would begin to accrue, liens would be imposed and property interests became subject to forfeiture), knowing that in most, if not all, cases Plaintiff's mortgagors and contract vendees (having purchased property "AS IS") would be unable to make all repairs within the time limit;

12.

As a result of Defendants' tortious conduct as aforesaid, Plaintiff has been damaged as follows:

A. Vendees of the following properties have ceased or skipped making payments to Plaintiff: 615 SE 47th; 745 NE Buffalo; 1036 SE 35th; 1334 SE 43rd; 2511 N. Argyle; 5711 SE Center; 6223 SE 85th; 6718 SE 89th; 7117 SE Cooper; 7825 SE Ogden; 8133 SE Glenwood; 8225 SE 64th; 8621 SE Raymond Ct; 8625 N. Fox; 9631 SE Boise.

B. Vendees have turned the following properties back to Plaintiff and Plaintiff has been unable to sell the properties at fair value: 5711 SE Center and 7117 SE Cooper; and

C. Enforcement fees resulting from the Dirty Dozen inspection program, of which Plaintiff is currently aware, for the properties listed on Exhibit 1, attached

hereto and by this reference incorporated herein, together with interest and penalties in a sum not less than $11,786.45 to date, and further damages resulting either from inspections previously conducted but of which Plaintiff is currently unaware or from Defendants' future inspections.

D. Investigation and legal fees in the sum of $10,500 charged by the Attorney General's Office in connection with the investigation induced by Defendants' actions as alleged in paragraph 8A, above.

All to Plaintiff's damage to date in the sum of $73,007.17. Plaintiff reserves the right to amend this complaint to seek further damages sustained or of which Plaintiff becomes aware during the pendency of this action.

* * * * *

FOURTH CAUSE OF ACTION

42 U.S.C. § 1983

23.

Plaintiff realleges paragraphs 1 through 6, 8 (A, B, E and F), 10 (A through C and E through I), 11 (A, C and D) and 12 above as if set forth fully herein.

24.

At all times material herein, Defendants have acted under color of law.

25.

Defendant City's actions or the actions of the individual Defendants, as the case may be, as alleged with specificity below, have exceeded and will exceed their lawful authority in that their acts, as alleged with specificity below, constitute violations of the United States Constitution. Such actions have caused and will cause deprivations of Plaintiff's rights, property, liberty, privileges and immunities secured by the United States Constitution and the laws of the United States of

America.

26.

There presently exists a justiciable controversy between Plaintiff and Defendants, whose interests are adverse, which controversy is ripe for adjudication as Plaintiff is seeking enforcement of its rights in its legally-protectable property interest from the actions of Defendants.

(Count One--Substantive Due Process)

27.

The conduct alleged below as part of this Count was taken by Defendants in furtherance of the official policy, practices and custom of the Defendant City. In the alternative, said conduct was taken by Defendants Kafoury, Sweet, and McKee in their individual capacities.

28.

Defendants engaged in the following conduct toward Lincoln which was arbitrary, capricious, without actual rational basis and in violation of Plaintiff's substantive due process rights provided pursuant to the Fourteenth Amendment to the United States Constitution.

A. Targeting Plaintiff under the "Dirty Dozen" Program with regard to the properties Plaintiff has sold under contract or mortgage, despite the fact that the expressed purpose of the Program was to cause code violations in certain rental properties to be remedied, with the intent to cause economic damage to Plaintiff, to cause forfeitures of Plaintiff's mortgagee and contract vendor interests in properties, to cause Plaintiff to be forced to sell its interests in the properties to third parties, and, ultimately, to drive Plaintiff out of business;

B. Including, as part of Title 29 of the Portland City Code (as amended in 1993) and the Dirty Dozen

Program, an unreasonably short period of time (thirty days) in which post-inspection repairs to targeted properties had to be made (or enforcement and associated fees, interest thereon, and penalties would begin to accrue, liens would be imposed and property interests became subject to forfeiture), knowing that in most, if not all, cases Plaintiff's mortgagors and contract vendees would be unable to make all repairs within the time limit;

C. Imposing enforcement fees against Plaintiff directly with respect to the properties sold by Lincoln on mortgage and contract, with said fees constituting senior liens on said properties under Title 29, the foreclosure of which, or the forfeiture of which, under Title 29, would deprive Plaintiff of its property interests, knowing that Plaintiff has no right to enter upon the properties to remedy alleged the violations which are the basis for imposing the fees;

D. Targeting and proactively inspecting only Plaintiff's mortgagors' and contract vendees' properties under the Dirty Dozen program, and no other similarly situated properties, and otherwise treating those in competition with Plaintiff more favorably than Plaintiff through enforcement fee waivers and the allowance of extended periods of time within which to remedy code violations and in doing so in violation of Defendants' own policy;

E. Inspecting one of the properties in which Plaintiff has a mortgagee's or vendor's interest in violation of a Temporary Restraining Order issued by this Court.

F. Charging or attempting to charge Plaintiff outrageous and unconscionable sums for transcripts of a hearing conducted by Portland hearings officer Schatzer;

G. Selecting potential "candidates," including

Plaintiff, for inspection under the Dirty Dozen Program by soliciting names in an arbitrary and subjective manner without providing any objective criteria to those from whom recommendations were solicited;

H. Rejecting objective criteria which has been found to correlate to major housing code violations, and instead selecting and utilizing vague, subjective, unwritten criteria as the means by which Defendants selected the Dirty Dozen targets whose properties would be subject to inspection; and

I. In general, conducting a vendetta against Lincoln to deprive Lincoln of its property interests based on disagreement with the manner by Plaintiff conducts its business, i.e. selling "fixer-upper" properties in "as-is" condition to people who the Defendants believe should not be allowed to purchase homes.

J. Inspecting the contracts or mortgages of Lincoln Loan's purchasers, informing them of purported misrepresentations or of defects therein and in bringing the contracts to the attention of the Attorney General's Office.

(Count Two--Federal Equal Protection)

29.

Plaintiff reallege paragraphs 1 through 6 as is set forth fully herein.

30.

The Dirty Dozen program violates Plaintiff's rights under the Fourteenth Amendment to the United States Constitution because the program is applied arbitrarily and capriciously, on an ad hoc basis, and not in accordance with sufficiently consistent standards to represent a coherent, systematic policy in that, (a) it targets properties which are not the subject to complaints; (b) there is no rational or systematic procedure to identify

all those who are properly within the scope of the Dirty Dozen program; or those to be inspected under the program and (c) Plaintiff is the only seller of property by contract and mortgage to be targeted under the Dirty Dozen program among the class of such sellers.

*****

(Count Six-Federal Equal Protection)

44.

Plaintiff realleges paragraphs 1 through 6 as if set forth fully herein.

45.

The Dirty Dozen program violates Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution because the program:

46.

Is applied arbitrarily and capriciously, on an ad hoc basis, and not in accordance with sufficiently consistent standards to represent a coherent systematic policy in that for example it targets properties which are not the subject of complaints, there is no systematic procedure or standards to identify all those who are within the scope of the Dirty Dozen program and the program allows for ad hoc discretion to select targets on appropriate grounds.

47.

As a result of the various constitutional violations set forth above, Defendants (that is, Defendant City with respect to Counts Two, Three and Four, and Defendant City or the individual Defendants with respect to Count One) are in violation of 42 U.S.C. § 1983. According, all inspections and enforcement actions taken under Title 29 and the Dirty Dozen program should be voided, future inspections and enforcement actions of the Dirty Dozen program as to Plaintiff and all property in which Plaintiff

has an interest should be enjoined and Plaintiff should be awarded: its special damages in a sum not less than $73,007.17 and its general damages for loss of reputation in a sum not less than $5 million, and punitive damages. In addition, Plaintiff is entitled to recover its reasonable attorney's fees and expenses incurred herein pursuant to 42 U.S.C. § 1988.

*****

WHEREFORE, Plaintiff prays that this Court enter judgment in its favor and against Defendants as follows:

1. Declaring Title 29 of the Portland City Code invalid and unconstitutional and entering permanent injunctive relief prohibiting Defendant City and any agent, employee, representative of Defendant City or any official thereof operating under Defendants' control, authority or direction or any other official charged with enforcement of City Codes from enforcing any and all provisions of Title 29 declared to be invalid and unconstitutional;

2. Declaring the Dirty Dozen scheme unconstitutional and further declaring null and void all Notices of Violations, assessments, enforcement fees, liens, other associated charges and penalties previously issued or levied against properties in which Plaintiff has an interest; entering permanent injunctive relieve prohibiting Defendant City and any agent, employee and representative of Defendant City, or any official operating under the control, authority or direction of Defendant City, or any other official charged with enforcement of the City Codes, from entering upon, assessing penalties or imposing liens against properties in which Plaintiff has an interest and enforcing said Title 29 unless a neighbor or resident of the property files a complaint with the Defendant City for housing code violations and then only

if the Notice of Violation is revised to properly disclose all appeal rights of owners.

3. On Plaintiff's claims for interference with contract and pursuant to 42 U.S.C. §1983 (Count Four only), $10,500.00 in special damages and for Plaintiff's reasonable attorney's fees incurred herein;

4. Alternatively, should Title 29 and the Dirty Dozen Program not be declared invalid and the Notices of Violation not be voided, then for Plaintiff's special damages in the sum of $73,007.17 plus such larger sum as may be proven at trial for damages arising or coming to Plaintiff's knowledge after filing of this complaint;

5. For Plaintiff's general damages in the sum of $5,000,000;

6. For the sum of $100,000 in punitive damages as against each individual Defendant to the extent these Defendants are proven to have violated Plaintiff's substantive due process rights;

7. For Plaintiff's costs and disbursements incurred herein; and

8. For such other and further relief as the Court may deem just and equitable.

DATED this 17th day of February, 1995.

GRENLEY, ROTENBERG, EVANS & BRAGG, P.C.

/s/ Jeffrey C. Bodie

Jeffrey C. Bodie, OSB #78150

Michael C. Zusman, OSB #84397

Of Attorneys for Plaintiff

Trial Attorney: Jeffrey C. Bodie, OSB #78150

APPENDIX G

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff,	)	No. 9403-02151
v.	)	ANSWER TO
THE CITY OF PORTLAND, GRETCHEN KAFOURY, DAVID SWEET, and MITCHELL MCKEE,	)	FOURTH AMENDED COMPLAINT WITH DEFENSES
Defendants.	)	

Defendants answer plaintiff's Fourth Amended Complaint as follows:

1.

Paragraph 1 is admitted.

2.

Paragraph 2 is admitted.

3.

The first two sentences of paragraph 3 are admitted. The third sentence is admitted, except that the plan included more than just classically defined landlords. The remainder of the paragraph is admitted.

4.

Paragraph 4 is admitted.

5.

The first two sentences of paragraph 5 are admitted. The third sentence is denied. Defendants admit that the actions of the individual defendants were within the course and scope of their employment.

6.

Paragraph 6 is denied.

*****

10.

Paragraph 10 is denied.

11.

Paragraph 11 is denied.

12.

Paragraph 12 is denied.

*****

23.

In response to paragraph 23, which reincorporates paragraph 1 through 6, 8 (A, B, E and F), 10 (A through C and E through I) and 11 (A, C and D) and 12 defendants incorporate by reference their responses to those same paragraphs.

24.

Paragraph 24 is admitted.

25.

Paragraph 25 is denied.

26.

Paragraph 26 is admitted.

27.

Paragraph 27 is denied.

28.

Paragraph 28 is denied.

29.

In response to paragraph 29, which reincorporates the allegations of paragraphs 1 through 6, defendants reallege their response to those same paragraphs.

30.

Paragraph 30 is denied.

*****

44.

In response to paragraph 44, which reincorporates the allegations of paragraphs 1 through 6, defendants

reincorporate their responses to those same paragraphs.

45.

Paragraph 45 is denied.

46.

Paragraph 46 is denied.

47.

Paragraph 47 is denied.

* * * * *

AS A THIRTEENTH AFFIRMATIVE DEFENSE, directed to plaintiff's claim under 42 USC §1983, labeled the Fourth Claim for Relief, the individual defendants allege:

76.

(Failure to State Claim)

The Claim fails to allege ultimate facts sufficient to state a claim for relief against defendants Kafoury, Sweet and McKee.

AS A FOURTEENTH AFFIRMATIVE DEFENSE, directed to plaintiff's claim under 42 USC §1983, labeled the Fourth Claim for Relief, defendant alleges:

77.

(Failure to State Claim)

The Claim fails to allege ultimate facts sufficient to state a claim for relief against defendant City of Portland.

* * * * *

WHEREFORE, defendants prays that plaintiff's complaint be dismissed and that judgment be entered in favor of defendants, together with defendants' costs and disbursements.

Respectfully submitted,
Jeffrey L. Rogers
City Attorney
By /s/ James H. Van Dyke
James H. Van Dyke #78413
Senior Deputy City Attorney
Of Attorneys for Defendants

APPENDIX H

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
COUNTY OF MULTNOMAH

LINCOLN LOAN, an Oregon Company,
Plaintiff,
vs.
THE CITY OF PORTLAND, et al,
Defendant

No. 9403-02151

Transcript of Proceeding

* * * * *

THE COURT: I think the first thing we need to take up is defendants' motions as to the constitutional claims, which I think is the only thing that we didn't take up at the end of the plaintiff's case. I think we all agreed we're going to treat those as though those motions were made and considered at the end of plaintiff's case, only that evidence to that point.

Mr. Van Dyke.

MR. VAN DYKE: Thank you very much, your Honor.

Good morning. I do want to talk about motions for a directed verdict on the constitutional issues that we have. And I'm not too concerned about taking them in any particular order, but if it makes sense to go through it in the same way that the complaint has it, then we can do that.

THE COURT: All right. We'll start with the four causes of action.

MR. VAN DYKE: What I need to be cognizant here is that I actually represent four defendants. I represent the City, and I represent defendants McKee, Sweet, Kafoury individually.

As to the Count 1, which is substantive due process, we would move for a directed verdict on that particular claim. The material that we submitted to the court, and we submitted some case law on substantive due process.

My understanding of substantive due process is that in order to find a violation, the City of Portland or the individual defendants, could not have had any legitimate reasons for its actions whatsoever. That is the test of substantive due process. It is not a test as to whether the City's housing code is particularly effective. It is not a balancing test. That is what the cases we provided indicate.

It is not a matter of weight that the court gives. I agree that substantive due process is a concept, is a constitutional concept that protects against arbitrary government action. But as long as the government has any legitimate basis for acting, the counts have held that there's no violation of substantive due process.

I think that the evidence is clear in this case that the City had a legitimate basis for passing the housing code. At least there was some legitimate basis for going out and inspecting the properties of Lincoln Loan. And on that basis, there's no substantive due process violation.

Moreover, where there has been no physical invasion of property, I think there is even a higher standard for the plaintiffs to bear in looking at a substantive due process.

So long as there is - - without that physical invasion, their claims are basically - - their claims are basically, what I would say are theoretical claims. The fact that they can argue that the government may have been motivated by bad faith is not really the test. The test is really did the government have any legitimate reason

for doing what it did. As long as you get to that point, then there isn't a substantive due process violation. As to the - - that's as to the City.

As to the individual defendants, I think they have qualified immunity for any substantive due process violation because in order to hold the individual defendants liable under 1983, there has to be a clearly established constitutional right of the plaintiff that is violated. And I don't think that under the circumstances of this case, that the evidence would support that there was a clearly established substantive due process right of the plaintiffs not to have their contract properties inspected.

Now, I've read some of the plaintiff's material. And I would agree with them that concepts such as due process and substantive due process and equal protection and so forth, certainly those are long-standing concepts, but that is different than whether or not the specific rights and the specific instances were clearly established, otherwise you never have qualified immunity. You just say well, we've had due process since the constitution was adopted and, therefore, it is a clearly established right to due process, and therefore the defendants have violated that right.

That can't be the test. The test has to be under the facts of this case, whether or not the plaintiff's had a clearly established right to due process.

I think the court can make that determination as a matter of law based on the evidence that it has received, regardless of whether the court takes into account the motivational aspects of the case. Even if the defendants - - even if one were to concede that the defendants had some sort of bad motivation, that is not the test. The test is apart from the motivation, did they then go forward

and violate a clearly established constitutional right to substantive due process?

That has not been - - that has not been shown here. In fact, one of the case that I presented to the court in the original trial notebook was the case of Armendariz vs Penman, which is a recent case from 1994, from the Ninth Circuit, 31 Federal 3d 860.

And in that case, the concern was whether or not the government could conduct housing sweeps through what they said was a blight area or a high crime area. And the plaintiffs alleged that actually what the government did in that case is come in and shutdown a bunch of properties in the process of their sweeps. At least they closed the property down temporarily while they were doing this.

And the plaintiffs argued that the government said well, there was an emergency and this is what we needed to do. And on Page 867 of that case, the court responded to that argument by saying that the plaintiff's argue that no emergency existed.

Basically, the government was faking the emergency, and that they were not closing the properties for the purpose of enforcing the housing and fire codes, but rather to reduce crime by relocating criminals and reducing urban blight.

And the court responded to that argument by saying the reduction of crime and relocating criminals bears a rational relation to the public health, safety and general welfare. Even though they faked the emergency, if they did so, that bore a sufficient rational relation to the general welfare that the plaintiff had no claim for substantive due process.

So what I'm suggesting here is the substantive due process threshold is an incredibly high one. So long as

the government has any basis whatsoever to conduct its operations as it did, it does not violate substantive due process. Here we have a case in which the plaintiffs actually alleged they faked it for other reasons. The court said it didn't make any difference.

Secondarily, as to the individual defendants, a slightly different question is raised, which is under the circumstances of this case, was there such a clearly established right to substantive due process, to the plaintiff's rights that were clearly established right to substantive due process, to the plaintiff's rights that were clearly established the individual defendants would know that they were violating substantive due process. I don't think they can meet either of those burdens. The fact that we inspect properties and impose enforcement fees, visited their properties, that just doesn't add up to that.

*****

MR. VAN DYKE: Okay. Again, I will move, on behalf of the City, I will move for a directed verdict for each individual defendant - -

*****

MR. VAN DYKE: Okay. In this case the pleadings indicate that Lincoln Loan contends that its rights to equal protection were violated when its properties were inspected; although no complaints had been received about them.

They also contend that their rights to equal protection were violated because the City lacked a systematic procedure to identify all those whose properties could have been inspected. And they contend that their rights to equal protection were violated when - - because it was the only seller of property by contract and mortgage to be targeted under the program. Those

are the allegations that base - - on which their equal protection argument is based.

Now, as to the first argument, I don't think the government is limited to reviewing properties that are the - - that are not the subject of complaints. I think we can go out and take a look at properties.

If you see a property that looks substandard and you can inspect it, I don't think that's a violation of the equal protection, nor has it been shown in this case that the only properties that are inspected proctively are the plaintiff's. In other words, the evidence has been that in the past, even before the new code, if the City inspectors drove by another house that looked bad, they could write it up.

THE COURT: They are saying you used this program, even though you may have had that on the jurisdiction under the housing code, that you took this rental program and focused it on their non-rental property.

MR. VAN DYKE: Right. And so since I don't find them to be a particularly suspect class for the purpose of equal protection, that is, when you're looking at equal protection, first you have to determine the scope of judicial review.

If they are not in a suspect class, the question is whether the government could have had a rational basis for reviewing their - - looking at their properties that were not the subject of complaints.

I don't think that the evidence shows that the City couldn't have had a rational basis between what it did and reviewing properties that were not the subject of complaints. I mean, the evidence was undisputed that we went out and took a look at those properties first before any of them were inspected at all. In fact, the

uncontradicted evidence was that the City drove by properties, some of their properties, and didn't inspect them at all.

In other words, the classification of deciding to look at their properties that are not the subject of complaints, that is not an equal protection violation so long as the government's idea of doing that has some rational relationship between its actions, which is the review and a legitimate City interest, which is the improvement of the property. That's not a violation of equal protection.

All the City's actions have to be - - have to have done is have some rational relationship to legitimate government interest. There's no authority for the proposition that an inspection program is deficient because properties are inspected in the absence of previously filed complaints. Actually, they don't allege that the method chosen by the City is constitutionally defective.

What they have alleged is that there's no method other than the receipt of complaints which is constitutionally permissible. I mean, at least in subparagraph A, because we look at properties that are not the subject of complaints. So what they are saying there is hey, if you don't have a complaint, you can't look at us. And as a result of that, that's a violation of equal protection. There's no constitutional violation there.

THE COURT: Okay.

MR. VAN DYKE: Now, let me just move onto B and C as long as I'm here, talking about equal protection.

The next thing they complain is a violation of equal protection is that there's no rational or systematic procedure to identify all those who were properly within the scope of the program. It is not a violation of equal

protection that all - - everybody who might be included is not included.

When the highway officer pulls over the person that's speeding on the highway, and the guy says hey, those other five cars were all going a lot faster, and you picked on me, the driver doesn't really have much of an argument to say but those other people were speeding, too. That's not a violation of equal protection on the highway, and it is not a violation of equal protection here that there might be other substandard houses out in the community that we haven't gotten to yet.

Number three, they claim that they are the only seller of property by contract and mortgage, quote, to be targeted. The class of contract sellers is not a suspect classification. So the government - - the City only needs a rational basis for inspecting their properties as opposed to others. There was a rational basis. We've seen pictures of the rational basis.

And in fact, the evidence in this case, your Honor, is that the violations found by the City actually existed, because your Honor has already ruled that because of claim preclusion, they cannot contend that those violations didn't exist, so we know the violations existed.

Now, since those violations existed, that's a matter of fact that's been established, certainly the government had a rational basis, that shows the government's rational basis in inspecting those properties, regardless of whether they were on contract or not. As to - - that's as to the City.

As to the individual defendants, once again, the plaintiff must prove as to each individual defendant that the law of equal protection was clearly established in regard to the inspection of contract properties in looking at properties which are not the subject of complaints and

in not identifying all those who are properly within the scope of the program.

There's a lot of evidence in this case. But the allegations of their equal protection argument what we're concerned about here. And those - - there is just no evidence to suggest that there's an equal protection violation based on those specific allegations so I think the individuals have qualified immunity. And there is no evidence to suggest equal protection violation by the City.

* * * * *

MR. VAN DYKE: Finally, your Honor, I know we reserved this, I just need to get this into the record. We had moved the other day on all of the damage items. I would just, to the extent the damage items are left in after the defendant's case has been presented, I need to move for a directed verdict on those basis as well. Your Honor's decision may not change based on that, but I needed to get that in for the record.

* * * * *

THE COURT: Motion is denied as to damages.

MR. BODIE: Thank you, your Honor.

THE COURT: Give me a moment to go back through my notes here on these constitutional issues.

Let me say that it is a real complicated issue. I've appreciated the amount of work that everyone has done. Mr. Zusman, I know you've been back there reading lots of cases and producing a lot of material, and it has been really helpful, and the City has done the same.

But they are not easy issues. I don't think they are as clear as either side would like them to be. I think you've all admitted that there's some area of debate honest, legitimate debate between the application of a lot of this law and on a lot of these issues.

I'm doing the best I can. Regarding the 1983 claims, which is the fourth cause of action, Count 1, substantive due process, I agree that there's an issue for the jury as to the plaintiff's claim against the City. I, however, agree with the City that qualified immunity would apply and remove the claim as it exists against the individuals.

As to Count 2, federal equal protection. I agree again with the plaintiff. There's an issue for the jury as to the City. But that there's not an issue to be presented to the jury as to the individuals.

*****

As to Count 5, the taking, and Count 6, the excessive fines, I think the City is correct in its application, and I agree with them on that.

So we have in the record in regards to the constitutional issues is the 1983 claim against the City for substantive due process, the 1983 claim for federal equal protection. Okay.

*****

MR. VAN DYKE: My understanding then, judge, is looking through my notes, is that the claims as to all of the individual defendants have been granted.

THE COURT: That's correct.

*****

MR. ZUSMAN: Let's talk about the fundamental rights issue. The City cited no case that says you can't have a fundamental right tied to a property interest. There isn't any. In fact, in the latest case cited by the defendants in their reply brief, there's this statement from the Bowers vs Hardwick cases. It talks about fundamental rights simply being, open quote, deeply rooted in US history or, open quote, implicit in the concept of ordered liberty.

I would respectfully suggest that the right to own property and the right to carry on a legitimate business are rather deeply ingrained in the concept of ordered liberty. We don't have government simply walking in taking property or shutting down legitimate businesses.

******

APPENDIX I

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
COUNTY OF MULTNOMAH

LINCOLN LOAN, an Oregon Company,	)
Plaintiff,	) No. 9403-02151
vs.	)
THE CITY OF PORTLAND, et al,	)
Defendant	)

Transcript of Proceeding

* * * * *

it to say, I've been in frequent communication with my co-counsel every night for about as long as I can remember now. We have –

MR. VAN DYKE: If it will save time, I believe there's evidence in the record of bad motivation. I believe there's evidence of that.

THE COURT: Your position is regardless of that, other legitimate reason, doesn't make any difference. I'm hearing that.

MR. VAN DYKE: For the purpose of this motion, I'm conceding that at least for the purpose of this motion at least there's a bad motivation.

MR. ZUSMAN: Mr. Bodie is whispering to me. I think it goes well beyond the evidence – the evidence about bad motivation.

THE COURT: The issue boils down is that you're taking the position that other legitimate reasons are irrelevant under the facts of this case.

Mr. Van Dyke is telling me that they are not.

MR. ZUSMAN: If the conduct is malice driven, it doesn't matter what purported basis the city can come up with after the fact.

THE COURT: That's as to the City.

MR. ZUSMAN: Okay.

*****

APPENDIX J

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

LINCOLN LOAN COMPANY, an Oregon Corporation, Petitioner on Review, vs THE CITY OF PORTLAND, Respondent on Review, and GRETCHEN KAFOURY, DAVID SWEET, and MITCHELL MCKEE, Respondents on Review.	)	Court of Appeals No. A90943 Multnomah County Circuit Court No. 9403-02151

ORAL ARGUMENT
May 11, 1998

****

that those violations actually existed and were undisputed is probably the single most important factor in this case in terms of substantive due process and equal protection analysis.

THE COURT: Now, we're talking about equal protection, the distinction from equal protection. With the hypothetical I gave you, is it possible that equal protection problem, assuming there's damage that's proved? As I understand it, the plaintiff's position is

that's exactly what's happened here, that the commissioner and the staff people essentially hated Lincoln Loan and decided to single Lincoln Loan out and bring the power of the government down upon them essentially in furtherance of their malicious purpose.

Why isn't that and equal protection violation?

MR. ROGERS: For two reasons, Your Honor.

First, there was no classification shown. The plaintiff did not show that there was any other business situated similarly to Lincoln Loan in relevant ways that was treated any differently. They merely assert that. They tried to, in their red brief, make that case by asking the court to take judicial notice of the number of contract sellers and the number of violations in the city, but we submit that's not -

THE COURT: Well it's in part. But (inaudible) Judge De Muniz's original reference to contract sales, part of what their (inaudible) protection distinction is that they say Lincoln Loan was the only contract vendor that was included in the dirty dozen program. Obviously they had rentals, but they also had contract sales, but the other, I assume, 11 didn't do contract sales, so they did rentals, and they say that point was distinction of (inaudible) that no other entity in the city which did both rentals and contract sales was included in the program.

MR. ROGERS: First, they haven't shown that. They haven't shown that there were others that did both that weren't included, but secondly, they haven't said what the significance of that is. Why would that be any more significant than they're saying that the owners of Lincoln Loan were the only ones who wore green shirts when they went to work. There's no significance that I can see constitutionally. The relationship is between enforcing the housing code and the violations which

actually existed, not whether it was done in a particular program or not. They asserted repeatedly - and it starts sounding as if it has some significance, but I have yet to understand what the significance can be.

I also want to say in answer to another part of your question, when you look at the nature of the motivations here by the city, what Lincoln Loan alleges is that the city did not like Lincoln Loan because of its business philosophy and practices. That to me is not an improper motive. It could not possibly be an improper motive. They don't allege, as is alleged in the cases where these cases have allowed - where these claims have gone to the jury - they don't allege thinks like a motivation because they didn't like them because they were Republicans or because of their religion. They didn't - the city, admittedly and correctly, I think - didn't like Lincoln Loan because of its business practices and philosophy, and those practices and philosophy resulted in multiple housing code violations chronically existing throughout the city.

So the assertion that there's an improper motive or maliciousness here seems to me to be flawed even at the outset, even before you get looking to the -

THE COURT: I think those allegations - and maybe I'm reading too much into this - but I thought those allegations could go to a court as sort of arbitrariness and capriciousness of the action that the city would take which could be part of substantive due process claim. Maybe I'm way off base there.

* * * *